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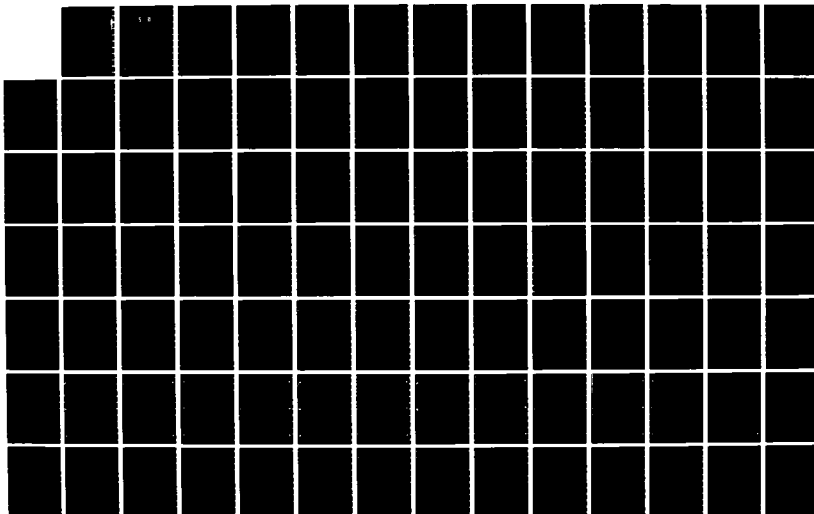
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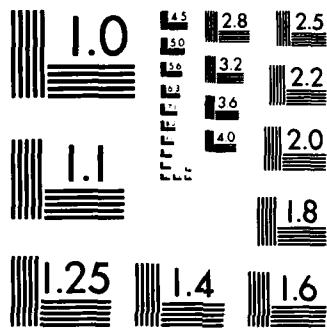
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THE NAVY CONTRACT CLAIMS PROCEDURE

by  
VINCENT T. HARTMANN  
CE: 697  
INDEPENDENT RESEARCH PROJECT

CONTRACT No. N00228-85-G-3282

PURDUE UNIVERSITY  
24 JULY 1986

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## ABSTRACT

→ The objective of this paper is threefold: 1). to consolidate the sources of information on the Navy contract claim process into an easy access guide reference for Navy junior officers; 2). to provide as an aid on explaining the Navy Civil Engineer Corp organization and, specifically, the Navy contract claim procedure to civilian contractors who do work for the Navy; and 3). to be used as a handout in the appropriate construction engineering and management classes at Purdue University for the students who may someday work for or with the Navy. ↗

This paper is divided into five sections. The first two, the history of the Civil Engineer Corps and the Naval Facilities Engineering Command organization structure are briefly discussed to aid those readers who are unfamiliar with the Navy system. The third section of this paper discusses the concept of law and the State and National or Federal court systems. The fourth section presents the Navy contract claims procedure. Here, the topic is not how to avoid claims, discuss the different types of claims, or how to prepare claims. What is presented is the procedure involved in resolving contractors claims and the various alternatives in the process available the contractor. Understanding this procedure is important for the civilian contractor so they know the requirements of a claim and how to properly prepare a claim. The fifth and last section of the paper compares the civilian (private) contract claim process with the government's.

## INTRODUCTION

The best kept secret in the Navy is the Civil Engineer Corps. Not until, approximately six months prior to my commissioning in the United States Navy Civil Engineer Corps in May 1981, was I even aware of the existence of the Civil Engineer Corps. Prior to my discovery, I had always associated ships and aircraft with the Navy. I had no idea of the shore establishment required to support a fleet of ships and squadrons of aircrafts.

The mission of the Civil Engineer Corps, like all shore commands is to provide services to the fleet. This means, to provide adequate utilities for hook-up to the ships when they dock, as well as repair facilities, training facilities, commissary and exchange facilities, housing facilities, etc.. These services are not only to be provided state side but everywhere the Navy sails. Once these facilities are in place, they have to be maintained. Shore establishments have been organized for the above described purpose to support the fleet and the Civil Engineer Corp is but one small organization with a very important role.

It was in my second tour of duty as an Assistant Resident Officer in Charge of Construction that inspired me to write this paper. As one quickly learns in a construction office, not only is construction performed, but a considerable amount of reconstruction is done as well. The reconstruction to which I refer is that of the facts and events that have taken place over the past year or years on contracts that are currently being disputed.

Prior to my assignment to the contracts office I had no experience or education in business or contract law. One of my first assignments in my new job was to prepare the government position on two claims recently received by the office on two separate contracts. One contract was 100 per cent complete and the other contract was near completion. I was lost, and soon realized there was little written that could be easily understood on the process involved in the contract claims procedures. There were limited instructions on how to prepare the government position on a claim and the instructions outlined the minimum information required to be included in the report. However, I wanted to know how the system worked and the process involved at every level of command in resolving a contractor's claim. I wanted to know more than the office's requirement to prepare and forward the government's decision to the contracting officer for issuance of a final decision within sixty days. Who really is the contracting officer?

This paper is specifically prepared for that individual who, like myself, is uneducated in the field of law yet interested in attaining a basic understanding of procedural law as it applies to contract claims. Hopefully, after having read this paper, the reader will possess a better understanding of the Navy contract claims procedure.



## PART I - THE HISTORY OF THE CIVIL ENGINEER CORPS

When the Navy Department was established in 1798 it consisted of three frigates - the United States, the Constellation and the Constitution. Congress had authorized the construction of additional naval vessels and six Navy shipyards were established at: Portsmouth, New Hampshire; Boston, Massachusetts; Brooklyn, New York; Philadelphia, Pennsylvania; Norfolk, Virginia; and Washington, D.C.. In 1868 the Philadelphia yard was moved to League Island. With the establishment of these shipyards, the Naval shore establishment was created.

President Jefferson had the foresight to authorize the first major naval civil engineering study of a drydock capable of holding the then twelve commissioned frigates during peacetime. After the plans were completed, Congress failed to appropriate the necessary funding for construction. The plans and, more importantly, the idea for a drydock remained stagnant until 1826 when President Adams persuaded Congress to authorize the design for two drydocks. One drydock was to be constructed in Boston, Massachusetts and the other in Norfolk, Virginia. In 1827 construction of the two drydocks began and it took nearly six years to complete both projects.

In 1842 the Bureau of Yards and Docks (BUDOCKS), presently the Naval Facilities Engineering Command (NAVFACENGCOM), was established. At its conception, the entire BUDOCKS staff consisted of six people - the Chief of the Bureau, a chief clerk, two clerks, a draftsman, and a messenger. In the years to follow, the number of Civil Engineers employed by the Bureau of Yards and Docks began to grow. This general

growth continued until the period of the Civil War. A recession followed the war and progress and expansion resumed only slowly.

The role of the civil engineer as "Civil Officers" during the Civil War prompted an Act of Congress in March 1867, that civil engineers thereafter should be commissioned by the President and thus the Civil Engineer Corps was born.

The size of the Civil Engineer Corps was set at ten officers in 1881. Included were one Captain, two Commanders, three Lieutenant Commanders and four Lieutenants. The Corps remained at this level until 1898 when it was increased to eighteen. Also in 1898, the first Civil Engineer Corps officer, Mordecai Endicott, became the Chief of the Bureau of Yards and Docks. Since that time the Chief of the Bureau has always been a Civil Engineer Corps officer, and in 1906 Congress passed a law to that effect.

In 1899, the size of the Corps was increased to twenty-one officers, and in 1903 to forty. In 1916 the size of the corps was, for the first time, based on a percentage of the number of officers in the line (then, roughly two per cent). This number was increased to three per cent in 1947.

As the number of Civil Engineer Corps officers grew, so did the naval shore establishment. Prior to World War I the strength of the Civil Engineer Corp was forty officers. During the war, the number leaped to over 200 officers. During the same period, the civilian employment of the Bureau of Yards and Docks rose from 63 to 714. Between July 1916 and November 1918, The Bureau of Yards and Docks

spent a total of \$347,000,000 for the first major expansion of the shore establishment. This figure exceeded the total amount spent on naval shore establishments in all of the prior years of the Navy's existence.

Following World War I, the strength of the Civil Engineer Corps declined to about 110 officers and it remained at that level until the rapid expansion in the period of mobilization for World War II. By 1945, at the peak of World War II, the number of Civil Engineer Corps officers rose to 12,000 - an increase of about sixty-four fold. By way of comparison, the increase in total naval strength was about twenty-five fold.

After the Nazi takeover in Austria in February 1938, the Navy embarked on a major expansion of the fleet. Between 1939 and 1941 work commenced on construction of air and naval bases around the world. The magnitude of this program becomes apparent when noting that during the World War II period there were 7427 contracts let by the Bureau of Yards and Docks with a cost over 7.8 billion dollars. Of these, 458 Cost-Plus-a-Fixed-Fee (CPFF) contracts accounted for 4.2 billion dollars. This type of contract was an innovation of World War II replacing the World War I Cost-Plus-a-Percentage-of-Cost type contract. Obviously, the new form did much to improve upon the features of the old system which actually gave the contractor an incentive to increase costs. The average fee paid during the years 1939 to 1943, the heaviest use of CPFF, was 2.84 per cent. This was substantially below the profit which a contractor would expect to average on lump sum competitive work.

Following World War II the permanent strength of the then 1400 Civil Engineer Corps officers was based on the three per cent line officer strength. Civil Engineer Corps officers became permanent members of the personnel allowance at nearly all shore activities. In addition, Civil Engineer Corps officers found themselves assigned to many higher command staffs with duties extending beyond purely civil engineering matters to broad areas of logistics.

In 1966 the Bureau of Yards and Docks was renamed the Naval Facilities Engineering Command as part of the overall reorganization of the Department of the Navy. The Naval Facilities Engineering Command reported to the Chief of Naval Material Command who reported to the Chief of Naval Operations. In 1985, the Naval Material Command was dissolved which resulted in the Naval Facilities Engineering Command reporting directly to the Chief of Naval Operations. This organization structure remains as so today.

Presently, the Civil Engineer Corps is approximately 1650 officers strong, each with duties that have grown and changed immensely over the past 119 years. The Civil Engineer Corps officer of today is involved in higher levels of management at a younger age than his civilian counterpart and he is held responsible for his actions. It is important for anyone working for or working with the Naval Facilities Engineering Command community to understand the history behind the organization and how the organization has grown to its present structure. [1]

PART II - THE NAVAL FACILITIES ENGINEERING COMMAND ORGANIZATION  
AND STRUCTURE

The Naval Facilities Engineering Command is comprised of the Naval District Washington D.C., six Engineering Field Divisions (EFD) Commands: Chesapeake Division, headquarters located at Washington D.C.; Northern Division, headquarters located at Philadelphia, Pennsylvania; Atlantic Division, headquarters located at Norfolk, Virginia; Southern Division, headquarters located at Charleston, South Carolina; Western Division, headquarters located at San Bruno, California; Pacific Division, headquarters located at Pearl Harbor, Hawaii and two area commands, the Atlantic Area and the European Area. See Figure 1 below for each divisions state boundaries.



FIGURE 1 [2]

The Naval Facilities Engineering Command is responsible for three primary disciplines: public works, contracts, and the SEABEES. The public works agencies are responsible for the maintenance of existing facilities and the design for all new construction or major renovation projects. The contracts office or the Officer in Charge of Construction (OICC) is responsible for the administration of construction contracts prepared by the public works agencies. The SEABEES are the military construction force that help construct and maintain facilities, primarily, at naval bases outside the continental United States. In a wartime scenario, SEABEES are both building and fighting men. SEABEE accomplishments during the time of war include providing air-strips, camps, hospitals, exchanges, roads, warehouses, storage tanks, fences, towers and anything to do with fighting a war or providing creature comforts for American forces.

In the Civil Engineer Corps community, the Naval Facilities Engineering Command is the highest echelon of command who reports directly to the Chief of Naval Operations. The Commander, Naval Facilities Engineering Command is the contracting officer. Depending on the dollar amount of a contractor's claim, NAVFACENGCOM delegates contracting officer authority to the Engineering Field Divisions on contractor claims of \$250,000 or less. The Engineering Field Divisions are further divided into area offices with limited contract authority. The authority limitations of each echelon of command will be discussed in detail in Part IV of this paper.

### PART III - THE STATE AND FEDERAL COURT SYSTEM

Law is a common word that everyone knows and uses but it is a word that is not easily defined. 'It is against the law' and 'law and order' are just two common phrases in which the word law is used. But what is law? Aristotle defined law as "a form of order". Black's Law Dictionary (third edition) defines law as: "That which is laid down, ordained, or established. A rule or method according to which phenomena or actions co-exist or follow each other. A system of principals and rules of human conduct, being the aggregate of those commandments and principles which are either prescribed or recognized by the governing power in an organized jural society as it will in relation to the conduct of the members of such society and which it undertakes to maintain and sanction and to use as the criteria of such members." [3] Laws are man made rules by which a society is governed. Since laws are man made and enforced by man, they may also be changed or adapted as society changes.

The source of law as we know it in the United States is governed by the U.S. Constitution. The first three articles of the constitution created the three branches of our national government as it exist today. Article I established the legislative branch of government which creates law. Article II established the executive branch of government which administers and enforces the law. Article III created the judicial branch of government which interprets the law and acts as guardian of the Constitution.

Law is divided into two broad categories: substantive law and

procedural law. Substantive law is "the body of constitutions, treaties, statutes, ordinances, judicial decisions, and regulations and decisions of administrative bodies which define the rights and duties of individuals and institutions in their mutual relationships".

[4] Simply stated, substantive law defines right and wrong. Procedural law is the procedure or the rules which both the plaintiff (the accuser) and the defendant must follow in order to get into court. Procedural law is "essentially concerned with the rules of the game and not necessarily with the outcome". [5]

Substantive law is further divided into three categories: criminal law, civil law, and equity law. Criminal law defines the state or national government as the prosecutor who always prosecutes the person who allegedly disobeyed the law. The person, the defendant, must be proven guilty beyond a reasonable doubt by a jury and the penalty imposed can be a fine, imprisonment or both. Civil law describes one person prosecuting another person seeking monetary compensation for personal injury and loss of property. The defendant can be proven guilty by a preponderance of the evidence and the penalty imposed is strictly monetary damages. Equity law is a specialized branch of civil law. In these specialized cases monetary compensation is not an adequate remedy because the act in dispute usually involves a unique item. The judge simply weighs the evidence presented by both parties, comes to a decision in the matter, and dictates what action will be taken to resolve the dispute.

The United States has several systems for resolving disputes and enforcing the law. The systems include the federal judicial system,



the fifty different state judicial systems, the quasi-judicial systems of the various state and national administrative agencies, and a non-judicial dispute-resolving system called arbitration. The federal and state systems are discussed below. The quasi-judicial system will be discussed in Part IV when the Navy contract claims procedure is presented. Arbitration will be explored in Part V when the civilian (private) construction claims process is compared with the Navy's procedure.

### THE STATE COURT SYTEM

Each of the fifty states has created or adopted its own state court system to best meet it's needs. Most states follow the four tier judicial system as diagrammed below.

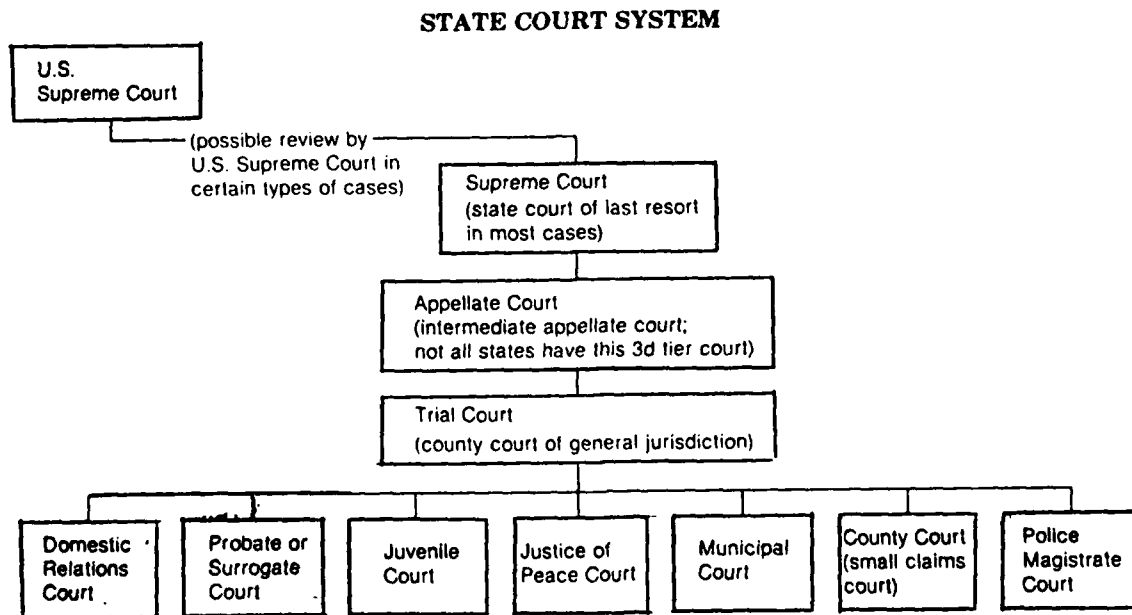


FIGURE 2 [6]

The first or lowest tier consists of the specialty courts of limited jurisdiction. Of note in this tier of the court system is that there, usually, is no provision for a jury trial. Also, most states have replaced the Justice of the Peace Court with a Small Claims Court staffed with a full time judge. The judge in the other state courts in this lowest tier often serves part time and is usually not a lawyer.

The second tier, the trial court with general jurisdiction, is the workhorse court of the state system. This court is referred to in some states as the District Court, Superior Court or Common Pleas Court. These courts handle major cases including criminal, civil and equity disputes. These courts are courts of record, meaning all testimony and proceedings are recorded and all pleadings are in writing.

The third tier is the intermediate appellate court. This court hears appeals on judgments in a lower court. To appeal a lower court judgment, the appellant must allege error in the trial. The appellate court reviews the transcript, the testimony, the evidence and the decision of the lower court. No new evidence may be entered into the appellate court. After review of the lower court, the appellate court renders a decision.

The fourth tier of the state court system is the state's Supreme Court or the state's Court of Last Resort. This court is also a reviewing court and is bound by the same constraints of the Appellate Court.

In unique situations the state's Supreme Court decisions may be appealed to the Supreme Court of the United States. These are cases in which the decision involves constitutional rights or a federal question. The procedure to appeal to the U.S. Supreme Court will be discussed in the Federal Court system described below.

### THE FEDERAL COURT SYSTEM

Similar to the state court system, the federal court system is a four-tier system as diagrammed below.

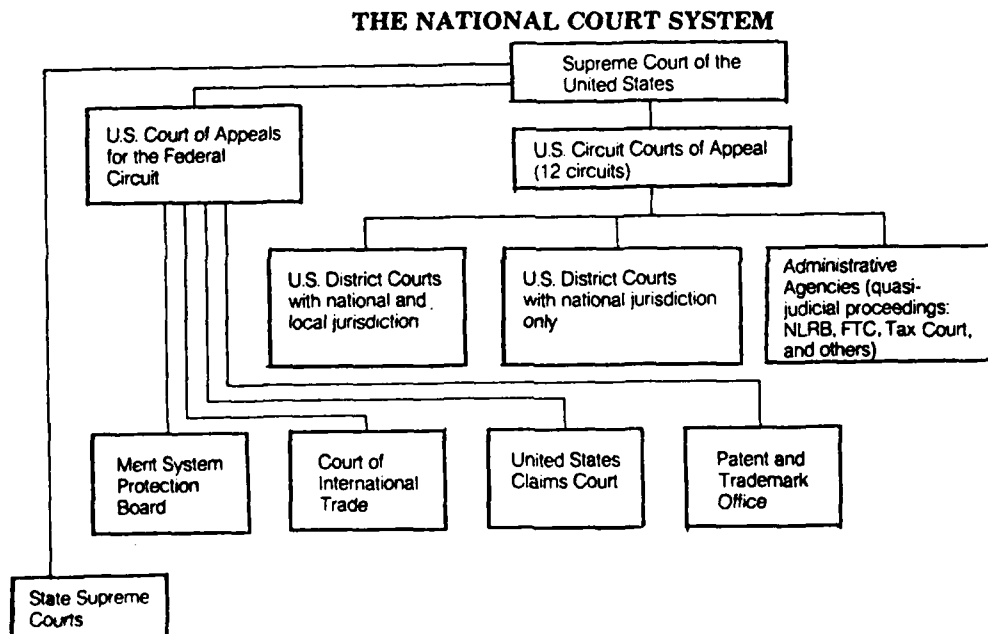


FIGURE 3 [7]

The first tier, again, is comprised of specialty courts. The difference here is that appeals from the specialty courts are made directly to the third tier level, the newly established, by the Federal Courts Improvement Act of 1982, U.S. Court of Appeals for

the Federal Circuit.

The second tier is the U.S. District Courts. The U.S. District Courts with national and local jurisdiction are courts for cases from the District of Columbia, Virgin Island and Guam which have no state courts. The U.S. District Courts have authority to hear criminal, civil and equity cases. The administrative quasi-judicial agencies are included in this second tier. These agencies are limited in jurisdiction to cases involving only their specialty area.

The third tier, U.S. Circuit Courts of Appeal for the Federal Circuit and the twelve U.S. Circuit Courts of Appeal, are the reviewing courts. The primary difference between the new U.S. Court of Appeals for the Federal Circuit and the twelve Circuit Courts of Appeal is that the jurisdiction of the new court is stated in terms of subject matter rather than geography. The new court hears appeals on cases which involve the subject matter within its jurisdiction regardless of the region of the country from which the claim or action originated.

The fourth and highest tier is the Supreme Court of the United States. There are three avenues of appeal to the U.S. Supreme Court. The first is by matter of right from either the U.S. Courts of Appeal or from the state's Court of Last Resort, the state's Supreme Court. The second method is by writ of certiorari - a formal request for review. This is only granted in cases where a federal question is involved. The writ of certiorari or petition is circulated among the nine justices of the Supreme Court who decide if a federal question is

involved. If at least four of the nine justices vote in favor of the review, the writ of certiorari is granted and the case is scheduled for a formal hearing. The Supreme Court reviews the transcript, the testimony, the evidence and the decision of the lower courts, together with briefs of the law prepared by the attorneys for both sides. The attorneys are also given an opportunity to argue before the Court. A decision is made by a majority vote of the nine justices. The third avenue to the U.S. Supreme Court is through certification. Certification is a procedure whereby the Appellate Court secures instructions from the U.S. Supreme Court as to a point of view of law without a formal hearing. This method is used much less frequently than the above mentioned two methods.

The Supreme Court of the United States is THE court of final resort for appeals on any case. [8]

PART IV - THE NAVY CONSTRUCTION CLAIMS PROCEDURES

Contractor disputes and the processing of contractor claims in Navy construction contracts are governed by the Disputes Clause of the construction contract, the Contract Disputes Act of 1978, the NAVFAC P-68 Contracting Manual, section 7, part 4 and the Federal Acquisition Regulation, (FAR) part 33. All four references may be reviewed in their entirety in Appendixes A thru D, respectively.

Resolution of contract disputes should be made at the lowest level of contracting officers authority as quickly as possible. The lowest level of authority in the Navy echelon of command is the Resident Officer in Charge of Construction (ROICC) or the Officer in Charge of Construction (OICC). Due primarily to financial considerations of both the Contractor and the Government, many and most disputes are resolved through negotiations before a claim is ever submitted by the contractor.

What is outlined below are the procedures for processing, reviewing and deciding those contractor disputes which are not resolved at the ROICC/OICC level and the resultant submission of a claim.

A claim as defined in the Disputes Clause is "a written demand or written assertion by one of the contracting parties seeking, as a matter of right, the payment of money in a sum certain, the adjustment or interpretation of contract terms, or other relief arising under or relating to the contract." [9]

The first decision in the processing procedure for contractor claims is contingent on the dollar amount claimed by the contractor. Contractor claims against the Navy of \$50,000 or less require, by the Contract Disputes Act of 1978, a contracting officers final decision within sixty days. A written claim by the contractor exceeding \$50,000 must be submitted with a certification essentially stating 1). that the claim is made in good faith, 2). that the supporting data are accurate and complete to the best of his knowledge and belief; and 3). that the amount requested accurately reflects the contract adjustment for which the contractor believes the government is liable." [10]

This certification must be executed by the owner or if the contractor is a corporation, a senior company official, an officer or general partner having overall responsibility for the conduct of the contractor's affairs. A claim in excess of \$50,000 without proper certification cannot be considered until such certification is received. Once the proper certification is received, the contracting officer must render a final decision on the claim within sixty days or notify the contractor of the date by which the decision will be made.

If the contractor's claim exceeds \$100,000, an advisory audit conducted by the Defense Contract Audit Agency (DCAA) must be performed, typically, before a contracting officer's decision is rendered. However, if the claim has no merit, a decision can be rendered and the audit is used to negotiate a settlement. It takes the Defense Contract Audit Agency a minimum of three months to prepare an audit. [11]

The present procedure of resolving contract disputes is outlined in the Contractors Disputes Act of 1978. To better understand the system as it exists today, it is best to review the system prior to the adoption of the Contractors Disputes Act of 1978 and analyze the impact of the Act has on the procedure. The post Contractors Disputes Act Disputes Clause presumes knowledge of the disputes process prior to the Contractors Disputes Act of 1978.

Prior to the Contractors Disputes Act of 1978 the disputes process in the federal system was based upon the Disputes Clause. The pre-Contractors Disputes Act Disputes Clause read as follows:

(a) Except as otherwise provided in this contract, any dispute concerning a question of fact arising under this contract which is not disposed of by agreement shall be decided by the Contracting Officer, who shall reduce his decision to writing and mail or otherwise furnish a copy thereof to the Contractor. The decision of the Contracting Officer shall be final and conclusive unless, within 30 days from the date of receipt of such copy, the Contractor mails or otherwise furnishes to the Contracting Officer a written appeal addressed to the Secretary. The decision of the Secretary or his duly authorized representative for the determination of such appeals shall be final and conclusive unless determined by a court of competent jurisdiction to have been fraudulent, or capricious, or arbitrary, or so grossly erroneous as necessarily to imply bad faith, or not supported by substantial evidence. In connection with any appeal proceeding under this clause, the Contractor shall be afforded an opportunity to be heard and to offer evidence in support of its appeal. Pending final decision of a dispute hereunder, the Contractor shall proceed diligently with the performance of the contract and in accordance with the Contracting Officer's decision.

(b) This 'Disputes' clause does not preclude consideration of law questions in connection with decisions provided for in paragraph (a) above; provided, that nothing in this contract shall be construed as making final the decision of any adminis-



The Contract Disputes Act of 1978

- 1). The Act gives the ASBCA jurisdiction on all claims arising under the contract. The ASBCA has authority to hear and decide not only the usual, historical disputed claims but also claims involving reformation, rescission or breach of contract.
- 2). The 30 day appeal period of a Contracting Officer's final decision was extended to 90 days.
- 3). A certification as described earlier is required on claims in excess of \$50,000.
- 4). The contractor has the option of choosing an administrative or judicial remedy in resolving his claim.
- 5). Interest on contractor claims now accrue from the date the claim is received rather than from the date of the Contracting Officer's decision.
- 6). Stiff anti-fraud provisions on contractor claims are now operative.
- 7). The ASBCA has the status and jurisdictional authority of administrative courts.
- 8). Contractors may appeal an ASBCA decision to the U.S. Court of Appeals for the Federal Circuit within 120 days after the date of receipt of the decision.
- 9). The contractor may appeal a Contracting Officer's decision to the U.S. Claims Court within 12 months after the receipt of the decision. [13]

The New Disputes Clause

- 1). The Contract is subject to the Contract Disputes Act of 1978.
- 2). The ASBCA has the same power of the Court of Claims to grant relief in respect to "all disputes" arising under the Act.
- 3). The clause defines a claim.
- 4). Certification must be submitted with all claims in excess of \$50,000.
- 5). Contracting Officer's decisions must be rendered within 60 days on all claims \$50,000 or less or notify the contractor of the date by which the decision will be made.
- 6). The Contracting Officer's decision shall be final unless

trative official, representative, or board on a question of law. [12]

The contractor was required to have processed his claim through the Armed Services Board of Contractor Appeals (ASBCA) if the dispute arose under conditions of the contract. Only if the contractor could show that the claim was based on a breach of contract could he bypass the ASBCA and bring his dispute to the Court of Claims. For claims less than \$10,000, the contractor could appeal to a Federal District Court. The contractor could appeal ASBCA decisions, however the decision was final on questions of fact if supported by substantial evidence. The Court of Claims could make its own determination on legal questions.

The Contract Disputes Act of 1978 allowed the contractor to choose which route to best process his claim for resolution. The contractor now may choose either a direct judicial process or submit his claim on adverse contracting officer's decisions to the quasi-judicial administrative agency, the ASBCA. The Act gave statutory authority supporting the process of settlement of disputes in government contracts that up to that time had been created solely by contract. The Act became effective on all contracts entered into since 1 March 1979. As a reminder, the Contract Disputes Act and the Disputes Clause can be found in its entirety in Appendices A and B respectively.

The important effects the Contract Disputes Act of 1978 and the Disputes Clause have on a construction contract claims are summarized below.

the contractor appeals or files a suit as provided in the Act. [14]

Table 1 that follows contains, in tabular format, the result or requirement of the pre-Contract Disputes Act dispute process with the present system in effect today as a result of the Act.

	Pre-CDA	CDA of 1978
1. Fraudulent claims	Not covered as such	Contractor liable for amount equal to unsupported part of claims plus costs for up to 6 years from commission.
2. Time limit on Contracting Officer's decisions	Reasonable time	Up to \$50,000-60 days Over \$50,000-60 days or notice of additional time required.
3. Claims certification	Not required	Required over \$50,000
4. Appeal to BCA from C.O.'s decision	30 days	90 days
5. BCAs	Established and regulated by agency	Statutory coverage; OFPP/Agency
6. Accelerated procedure before BCA's	Up to \$25,000	Up to \$50,000 at Contractor's option; 180 day deadline for decision

7. Appeal of BCA decisions to Court of Appeals for the Federal Circuit (CAFC)	Contractor Government	6 years No right of appeal	120 days 120 days with Agency Head and Attorney General approval
8. U.S. District Courts		Juris up to \$10,000	No juris. (except in TVA cases)
9. Small claims before BCA's		Covered under accelerated procedure above	Up to \$10,000, nonappealable decision required within 120 days
10. Direct access to US Claims Court by Contractor		Only on pure questions of law	Up to 12 months from Contracting Officer's decision
11. BCA finality		Only on questions of fact; Anti-Wunderlich Act standards apply	Same
12. BCA jurisdiction		Questions of fact arising under the contract	"All claims" arising under (or related to) the contract
13. BCA subpoena power		None	Authorized; enforceable through USDC
14. Interest on Contractor claims		Payable from date of Contracting Officer's Decision	Payable from date Contracting Officer receives claim

TABLE 1 (15)

Figure 4 illustrates a block diagram of the roadmap of contractor remedies on construction claims. The remaining portion of this section will describe the various alternatives available to the contractor in obtaining a fair and reasonable settlement from the Navy on his claim. The procedure involved in the Navy rendering a contracting officer's decision, the Command Contract Award and Review Board and the procedure and the rules of the ASBCA will be discussed in detail.

As explained in Part III of this paper, the State and Federal Court System, the first three Articles of the Constitution created respectively, the legislative, the executive and the judicial branches of the government. It is through the executive branch of government that the majority of contractor claims are resolved. Upon submission of a claim, the contractor has the option of deciding to process his claim through an administrative agency, the ASBCA, or directly to the U.S. Claims Court. At any point in the executive or the administrative process, the contractor may appeal his case to be heard in the federal Judicial Court system. The administrative agency route, the ASBCA route, is usually the fastest and least expensive method of resolving a claim for both the contractor and the government.

The alternate routes available the contractor to obtain a resolution of his claim will now be discussed.

A claim is a direct result of a contractors inability to receive an adjustment, interpretation or other relief by the Navy of the contract terms. The contractor's first course of action, prior to a formal submission of a claim, is to obtain in writing the ROICC/OICC

# ROADMAP OF CONTRACTOR REMEDIES

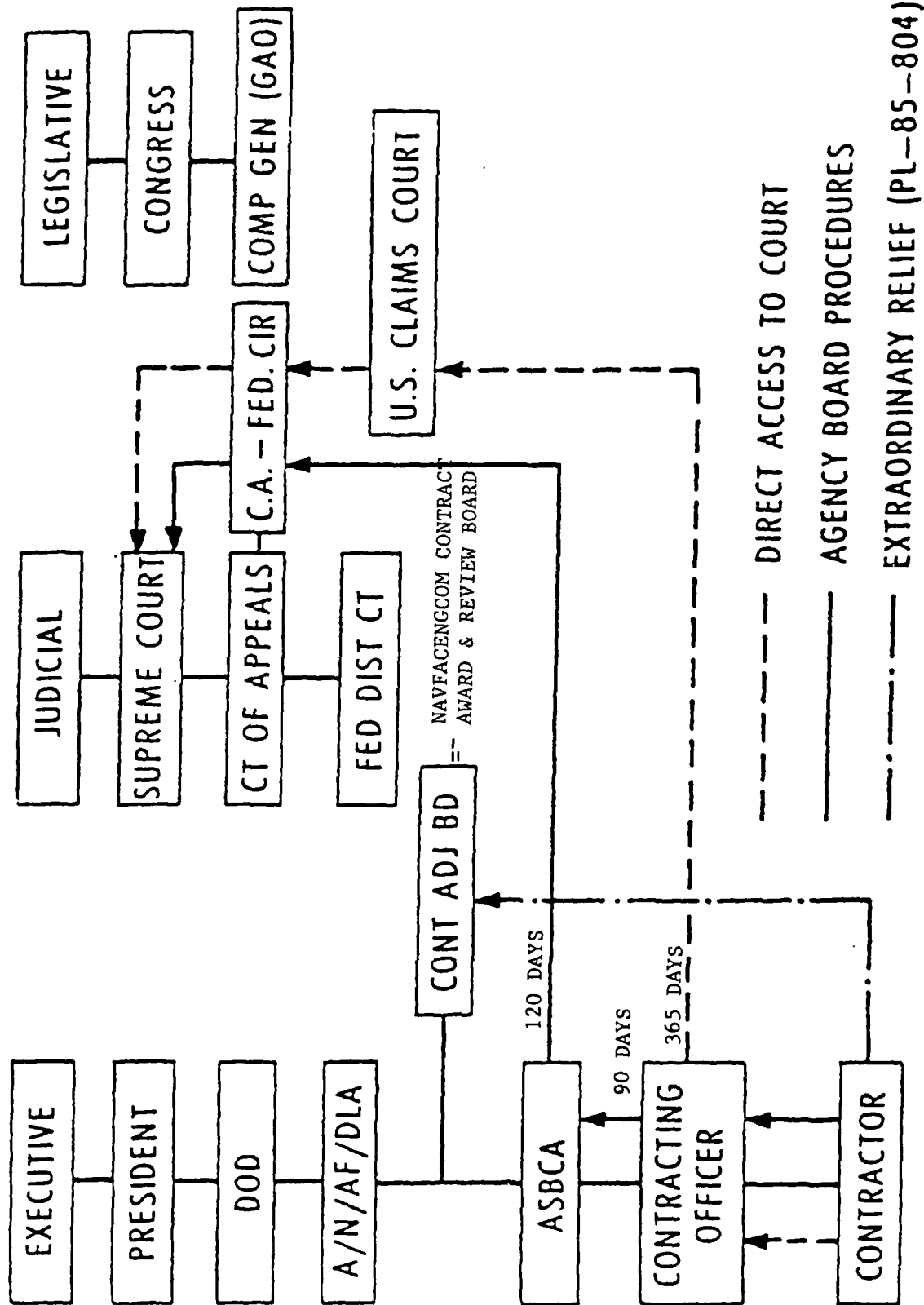


FIGURE 4 (16)

position on the matter in question. After review of the contractor's position, the ROICC/DICC will either consider the request warranted and begin negotiations of a contract modification or deny the request of the contractor. The ROICC/DICC's denial of a contractor's request is not a contracting officer's final decision and it should close with the following language:

The DICC has determined that you have not presented sufficient justification or data to warrant the contract adjustment you have requested. If you disagree with this determination, you may request a decision of the Contracting Officer pursuant to the provisions of the disputes clause of your contract. Such requests should be forwarded via this office. You may submit additional information and you may request that the previous correspondence concerning this matter be forwarded to the Contracting Officer for further review and determination. This letter is not a Final Decision of the Contracting Officer. [17]

If the initial request is denied, the contractor will probably escalate his request to a claim and demand in writing a contracting officer's decision. The process and handling of the claim is subject to the Contract Disputes Act of 1978. It is at this point, when a contractor requests a contracting officer's decision, that the block diagram of Figure 4 is applicable.

Once a contractor submits a claim he may either request a contracting officer's decision in writing or he may request a hearing before the NAVFAC Contract Award and Review Board. The great majority of contracting officer's decisions are rendered on the basis of the record; that is, the correspondence and other data which have been forwarded to the authorized officer by the contractor and the ROICC/DICC.

### CONTRACTING OFFICER AUTHORITY

The Contracting Officer is the Commander, Naval Facilities Engineering Command (NAVFACENFCOM) in Alexandria, Virginia. He has delegated contracting officer authority to the Engineering Field Division level on disputes of \$250,000 or less. Contracting officer decisions on claims in excess of \$250,000 are reviewed and issued by NAVFACENGCOM.

Engineering Field Division Commanders may delegate authority and appoint contracting officers for the award and administration of selected contracts. This contracting officer's authority may include final decisions on disputes arising under the contracts within his authority and terminating contracts for default when the contractor has abandoned the work and the contract value does not exceed \$50,000.

A contracting officer may exercise only that authority specifically delegated to him and he must receive instructions in writing, regarding the extent of and the limits to such authority. Tables 2 and 3 below summarize the seven levels of contracting officer warrants and the basic qualifications required for each level of NAVFACENGCOM contracting officer authority.

The Contractor initiates a claim by submitting a written request, with proper certification if the claim is in excess of \$50,000, to the ROICC/DICC for a contracting officer decision. The ROICC/DICC immediately notifies the respective Engineering Field Division of receipt of the claim. The ROICC/DICC has been instructed to, within 10 calendar days of receipt of the claim, submit to the



FIELD OICC & EFD  
CONTRACTS DIVISION STAFF

Warrant Levels

FIELD  
OICC WITH  
NAVFAC  
COUNSEL  
II (4)

EFD

Type  
Contract(2)

I (3)

II (4)

III (5)

IV

V

VI

VII

1. Construction, Repair, Alter.	Unlimited	\$5 Mil	\$1 Mil	\$500,000	\$100,000	\$25,000	\$2,000
2. Purchase	Unlimited	\$5 Mil	\$1 Mil	\$500,000	\$100,000	\$25,000	\$2,500
3. Demolition	Unlimited	\$5 Mil	\$1 Mil	\$500,000	\$100,000	\$25,000	\$2,000
4. Transp. Maint.	Unlimited	\$5 Mil	\$1 Mil	\$500,000	\$100,000	\$25,000	\$2,500
5. Transp. Service	Unlimited	\$5 Mil	\$1 Mil	\$500,000	\$100,000	\$25,000	\$2,500
6. Maint. Service	Unlimited	\$5 Mil	\$1 Mil	\$500,000	\$100,000	\$25,000	\$2,500
7. A-E & E-S	Unlimited	\$500,000	\$200,000	\$200,000	\$100,000	N/A(6)	N/A
Slate & Selec & Neg	Unlimited	\$5 Mil	\$1 Mil	N/A	N/A	N/A	N/A
8. Utility (7)	Unlimited	\$5 Mil	\$200,000	\$100,000	\$100,000	\$25,000	\$2,000
9. Competitive	Unlimited	\$5 Mil	\$1 Mil	\$500,000	\$100,000	\$25,000	\$2,500
10. Timber/Forestry	Unlimited	\$5 Mil	\$1 Mil	\$500,000	\$100,000	\$25,000	\$2,000
11. In Scope Changes	Unlimited	\$5 Mil	\$1 Mil	\$500,000	N/A	N/A	N/A
12. Final Decisions (8)	\$250,000	N/A	N/A	N/A	N/A	N/A	N/A
13. Default	\$50,000	N/A	N/A	N/A	N/A	N/A	N/A
14. Irregular Bids	Unlimited	N/A	N/A	N/A	N/A	N/A	N/A
15. Indef. Quantity	Unlimited	\$5 Mil	\$1 Mil	\$500,000	\$100,000	\$25,000	\$2,500
16. Single Source	\$100,000	\$75,000	\$50,000	\$50,000	\$25,000	\$25,000	\$1,000
17. "8A" Negotiated	Unlimited	\$5 Mil	\$200,000	\$100,000	N/A	N/A	N/A

TABLE 2 (18)

NAVFACENGCOM CONTRACTING OFFICER AUTHORITY

(1) LEVEL VII (\$2,500/\$2,000)

- a. Experience Six months of Government contracting experience.
- b. Education High School Graduate.
- c. Training CECOS Construction Contract Administration course or Defense Small Purchase Course or Management of Defense Acquisition Contracts.
- d. Duties The individual regularly dedicates a significant portion of his/her time to small purchase procurement matters.

(2) LEVEL VI (\$25,000)

- a. Experience One year of Government contracting experience.
- b. Education Same as Level VII.
- c. Training Satisfactory completion of two of the courses designated for Level VII.
- d. Duties Same as Level VII.

(3) LEVEL V (\$100,000)

- a. Experience Shall have two years of progressively complex Government contracting experience.
- b. Education Preferably an Associate's degree or two years college level specialized study in the field of Business Administration, Accounting, Economics, Law or Engineering.
- c. Training Same as Level VI plus Construction Contract Modification Course (CECOS) and Facilities Support Contracting (CECOS).
- d. Duties Majority of time (over 50%) is spent on procurement matters.

(4) LEVEL IV (\$500,000)

- a. Experience Shall have three years of progressively complex Government contract related experience, with at least one year of specialized experience in construction and/or facility support contracting.
- b. Education Same as Level V.
- c. Training Same as Level V plus course in Defense Cost and Price Analysis and Contract Law.
- d. Duties Primary duties (over 75%) are supervising or performing procurement functions.

(5) LEVEL III (\$1,000,000)

- a. Experience Shall have five years of progressively complex Government contracts related experience with at least two years of specialized experience in construction and/or facility support contracting.
- b. Education A Bachelor's degree is highly desirable preferably in Business Administration Accounting, Economics, Law or Engineering.
- c. Training Same as Level IV plus CECOS Design Contract Management Course and Advanced Contract Administration.
- d. Duties Same as Level IV.

(6) LEVEL II (\$5,000,000)

- a. Experience Same as Level III.
- b. Education Same as Level III.
- c. Training Same as Level III plus participation in NAVFAC Executive Institute Levels I-IV, Two-Step Multiyear Procurement.
- d. Duties Same as Level III.

(7) LEVEL I (UNLTD)

- a. Experience Same as Level II.
- b. Education Same as Level II.
- c. Training Same as Level II plus Graduate of NAVFAC Executive Development Program highly desirable. Attend Defense Acquisition and Contracting Executive Seminar.
- d. Duties Same as Level II.

TABLE 3 (19)

Engineering Field Division their analysis of the claim with the basis of denial. If the claim exceeds \$250,000 the Engineering Field Division will, within 20 days after receipt of the claim and subject to the DCAA audit review, submit to NAVFACENGCOM their review of the claim and appropriate recommendations. Regardless, whether NAVFACENGCOM or the appropriate Engineering Field Division command is the authorized contracting officer, the decisions are rendered on the basis of the record. All echelons of the Navy are well aware of this fact and the submittal from the ROICC/OICC/EFD will be well documented, complete in every detail and presented in a logical, factual and professional manner. Contractors are advised to prepare their claims similarly.

NAVFACENGCOM CONTRACT AWARD AND REVIEW BOARD

If the contractor opts to present his claim personally he may do so by requesting a NAVFACENGCOM Award and Review Board. The Board is composed of experienced military and civilian personnel who will normally have had no knowledge of the matter in dispute prior to the hearing. The procedures are informal in nature and ordinarily no verbatim transcript of the testimony is taken. The senior Member will open the hearing and subject matter before the Board. He will then call upon the contractor to present his position.

The contractor is permitted full freedom of presentation. He is allowed to present his position fully and in any manner he chooses. He may select any of his representatives to present his claim. He may bring attorneys, witnesses and experts, and he may present such documents as he deems necessary to sustain his position. During the course of the presentation, the Board may ask questions regarding particular aspects of the contractor's claim. The Engineering Field Division representatives will be requested to set forth the government's position.

At the completion of the presentations, the Board will normally adjourn briefly to determine if there are any areas requiring clarification. Also, an opportunity will be afforded to both the contractor and the Engineering Field Division personnel to challenge any points raised by the other side. At the completion of the discussion, the Board will adjourn to consider the merits of the contractor's claim. The adjournment may last anywhere from a few minutes to a few days.

If an extended adjournment is anticipated, the contractor and the Engineering Field Division personnel will be notified of a date and time for reconvening and issuance of a decision.

If the Board decides that the contractor is entitled to some, but not all, additional compensation or time extension, the Board will attempt to negotiate a settlement at that time. If the contractor's claim is denied, the contractor may either drop his claim or appeal the Board's decision to the next level of jurisdiction.

The contractor may appeal the contracting officer's decision to the ASBCA within 90 days, or appeal his case directly to the Court of Claims within one year of a contracting officer's decision. This also holds true if the contractor requests a contracting officer's decision on the basis of record. Approximately 50-75% of the contracting officer's decision are appealed to the ASBCA. Based on past history the contractor has a 50/50 chance of losing it all if his claim reaches this level in the appeal process. The average lapsed time for the ASBCA hearing is approximately six months and the Court of Claims hearing will probably be twice that length in time. [21], [22]

ARMED SERVICES BOARD OF CONTRACT APPEALS (ASBCA)

The Armed Services Board of Contract Appeals (ASBCA) is a quasi-judicial administrative agency created by and an authorized representative of the Secretary of Defense, the Secretary of the Army, the Secretary of the Navy, and the Secretary of the Air Force. It is recognized by statute to hear appeals by contractors or their authorized representatives from decisions of contracting officers. Members of the Board are designated Administrative Judges. Their qualifications consist of being a licensed attorney with no fewer than five years experience in public contract law and who have been admitted to practice before the highest court of any state or the District of Columbia. The chairman and the two vice-chairmen of the Board are appointed by the assistant Secretary of Defense and the Assistant Secretaries of each of the Military Departments.

The chairman of the Board is responsible for establishing divisions of the Board to provide for the most effective and expeditious handling of appeals. A division consists of one or more members of the Board and the chairman designates one member of the division to act as the division head. Decision of the Board are by majority vote of the members of the division, the chairman and the vice chairman. The chairman may refer an appeal of unusual difficulty, significant precedential importance, or serious dispute within the normal decision process for decision by a senior deciding group.

The ASBCA has jurisdiction to decide any appeal from a decision of a contracting officer (1) relating to a contract made by its

agency, and (2) relating to a contract made by any other designated agency board authorized to decide the appeal. The ASBCA is authorized to grant relief that would be available to a litigant asserting a contract claim in the Claims court.

Subject to approval of the Assistant Secretary of Defense and respective Assistant Secretaries of the Military Departments, the ASBCA adopts its own rules and regulations for its conduct, the procedure, the preparation, and presentation of appeals and issuance of decisions. A complete copy of the Rules of the Armed Services Board Of Contractor Appeals is included in Appendix E.

The decisions of the ASBCA shall be final, except that -

- 1). A Contractor may appeal such a decision to the United States Court of Appeals for the Federal Circuit within 120 days after the date of receipt of a copy of such decision, or
- 2). The ASBCA chairman may if he determines an appeal should be taken and with prior approval of the Attorney General, transmit the decisions of the ASBCA to the United States Court of Appeals for the Federal Circuit for judicial review within 120 days from the date of the Boards decision. [23]

The ASBCA is a quasi-judicial administrative agency created by the executive branch of the national government to provide a relief

mechanism of appeals by contractors of contracting officer's decisions on disputes. The Contract Disputes Act of 1978 authorized the ASBCA to grant relief that would be available to a litigant asserting a claim in the U.S. Claims Court. As discussed earlier, the ASBCA route in resolving disputes is more than often the most expedient and the least expensive route in the appeal process of a contracting officer's decision. Since the ASBCA is not a court with total judicial jurisdiction, the contractor may appeal an adverse decision by the ASBCA to the United States Court of Appeals for the Federal Circuit. Once a dispute reaches the judicial level in the appeal process, the case may only be appealed to a higher reviewing court on a technicality, if the contractor alleges error in the trial, or if a federal question is involved.

The following paragraphs highlight important rules of the ASBCA.

Rule 1). Appeals, How Taken

Notice of an appeal must be in writing and filed in triplicate with the contracting officer within 90 days of the contracting officer's decision.

Rule 2). Notice of Appeal, Content of

The notice of appeal should indicate that an appeal is intended, the contract number, the department cognizant of the dispute, the decision from which the appeal is taken and the amount of the dispute. The notice of appeal should be signed by the appellant or the appellants authorized representative or attorney.

Rule 3). Docketing of Appeals

A notice of appeal shall be docketed by the Board upon receipt. Notice in writing shall be given the appellant and the contracting officer along with a copy of the rules of the ASBCA.



Rule 4). Preparation, Contents, Organization, Forwarding, and Status of Appeal File

- a). Duties of Contracting Officer -  
Within 30 days of receipt of an appeal the contracting officer shall assemble and transmit an appeal file to both the ASBCA and the appellant (contractor).
- b). Duties of Appellant -  
Within 30 days of receipt of the appeal file assembled by the contracting officer, the appellant shall supplement the same by transmitting to the ASBCA and the government trial attorney any documents not contained therein which he considers pertinent to the appeal.

Rule 6). Pleadings

- a). Within 30 days after notice of docketing of the appeal the appellant must file a complaint with the Board setting forth simple, concise and direct statements of each of his claims, alleging the basis, with appropriate reference to contract provisions for each claim, and the dollar amount claimed.
- b). Within 30 days after receipt of said complaint the government shall prepare and answer with defenses to each claim asserted by the appellant.

Rule 8). The appellant shall upon receipt of the respondent's answer of the claims, advise the ASBCA whether he desires a hearing or submit his case on the record without a hearing. Also, the appellant shall elect, if the claim qualifies, whether he desires the optional accelerated procedure discussed below in Rule 12.

Rule 11). Submission without a Hearing

Affidavits, depositions, admissions, answers to interrogatories and stipulations may be employed to supplement other documentary evidence in the ASBCA Record if either party elects to waive a hearing and to submit his case upon the record.

Rule 12). Optional Small Claims (Expedited) and Accelerated Procedures

If the amount of an appeal from a decision of a contracting officer is less than \$50,000 the appellant, contractor, may elect to have the appeal processed under a shortened and accelerated procedure. Appeals under the accelerated procedure shall be resolved, whenever possible, within 180 days from the date the contractor elects to utilize such procedures.

If the amount of an appeal from a contracting officer is less than \$10,000 the appellant, contractor, may elect to have the appeal processed under the small claims procedure. The small claims procedure provides for simplified rules of procedure to facilitate the decision. Such appeals may be decided by a single member of the board, whenever possible, within 120 days from the date on which the contractor elects to utilize such procedure.

Rule 14). Discovery - Deposition

Both parties are encouraged to engage in voluntary discovery procedures.

Rule 17). Hearings, Where And When Held

Hearings will ordinarily be held in Washington D.C, except that upon request seasonably made and upon good cause shown The ASBCA may in its discretion set the hearing at another location.

Rule 18). Notice of Hearing

The parties will be given at least 15 days notice of the time and place set for hearings.

Rule 20). Nature of Hearings

Hearings shall be as informal as may be reasonable and appropriate under the circumstances.

Rule 28). Decisions

Decisions of the ASBCA will be made in writing and authenticated copies thereof will be forwarded simultaneously to both parties. The rule of the ASBCA and all final orders and decisions shall be open for public inspection.

Rule 29). Motions For Reconsideration

A motion for reconsideration, if filed by either party, shall set forth specifically the ground or grounds, relied upon to sustain the motion, and shall be filed within 30 days from the date of the receipt of a copy of the decision of the ASBCA by the party filing the motion. [24]

Part V - Resolution of Contractor's Claims in Private Contracts Versus  
The Navy's Claim Procedure

The majority of disputes or claims in private construction contracts are resolved through arbitration. Arbitration is "a pre-agreed to method of resolving disputes by an informal tribunal in which a neutral person or persons renders a final decision on the dispute." [25] Government contracts are not subject to arbitration because public funds are involved. Resolution of disputes through arbitration places in the hands of the arbitrator the power to decide and award monetary damages. Since all government construction contracts authorize the expenditure of public funds, contractor claims against the government can only be resolved through the system described in Part IV of this paper.

Most private construction contracts are governed by one of three formal agreements: the American Institute of Architects (AIA), the National Society of Professional Engineers (NSPE) or the Associated General Contractors of America (AGC). All three of these standard forms of contracts include an arbitration clause similar to the one recommended by the American Arbitration Association (AAA), which reads:

Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be settled by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association, and judgement upon the award rendered by the Architect (s) may be entered in any court having jurisdiction thereof. [26]

A complete copy of the Construction Industry Arbitration Rules of the American Arbitration Association are included in Appendix F.

Arbitration has been created to be a substitute for and not a springboard for litigation. Arbitration is a quasi-judicial procedure favored and supported by the courts. Depending on the state's arbitration statute and the Federal Arbitration Act, courts will only hear and overturn an arbitrator's decision on carefully circumscribed grounds. Typically, these circumscribed grounds involve cases of fraud or if some other element is present which would support a contention that the award should be reviewed and/or modified.

Once a contract is signed and awarded with an arbitration clause, both parties have agreed that all disputes will be submitted to arbitration. All disputes of either contracting party are first submitted to the design architect for a decision. The architect, essentially, acts as a contracting officer in comparison with the Navy's claim process. If both parties cannot mutually agree on or accept the decision of the architect, resolution of the dispute is bound by the arbitration clause of the contract. The procedure and the rules governing arbitration as outlined by the Construction Industry Arbitration Rules of the American Arbitration Association (AAA), Appendix F, is as follows.

Rule 7). Initiation under an Arbitration Provision  
in a Contract

As specified by the terms of the Contract, the initiating party shall file with the other party a notice of intention to arbitrate. The notice shall contain a statement setting forth the nature of the dispute, the amount involved and the remedy sought.

The defendant party may file an answering statement within seven days after the notice of arbitration from the AAA is received.

Rule 11). Fixing of Locale

The parties may mutually agree on the locale where the arbitration is to be held.

Rule 13, 14 & 15 Refers to Appointments of Arbitrators

The AAA method of selecting a neutral arbitrator is to allow the AAA to prepare a list of experts in the industry. This list is sent to both parties for review and any name objectional to either party is eliminated and the remaining names are numbered by preference. This way an arbitrator agreeable to both sides is appointed. A least preferred method involves the appointment of three arbitrators. The owner selects one arbitrator, the contractor another and the two appointed arbitrators select the third.

Rule 17). Number of Arbitrators

If the arbitration agreement does not specify the number of arbitrators, the dispute shall be heard and determined by one arbitrator, unless the AAA, in its discretion, directs that a greater number of arbitrators be appointed.

Rule 21). Time and Place

The arbitrator shall fix the time and place for each hearing.

Rule 25). Majority Decision

Whenever there is more than one arbitrator, all decisions of the arbitrators must be by at least a majority.

Rule 29). Order of Proceedings

Both the plaintiff and the defendant parties shall be afforded full and equal opportunity to present its claim, proofs and witnesses, who shall submit to questions and cross-examination. Usually, the plaintiff presents his case first and then the defendant follows.

Rule 35). Closing of Hearing

The arbitrator shall specifically inquire of both parties whether they have any further

proofs to offer or witnesses to be heard. Upon receiving negative replies, the arbitrator shall declare the hearing closed and a minute thereof shall be recorded.

Rule 41). Time of Award

The award shall be made promptly by the arbitrator and, unless otherwise agreed by the parties, or specified by law, not later than thirty days from the date of closing the hearings, or if oral hearings have been waived, from the date of transmitting the final statements and proofs to the arbitrator.

Rule 43). Scope of Award

The arbitrator may grant any remedy or relief which is just and equitable and within the terms of the agreement of the parties.

Expedited procedures of construction arbitration shall be applied in any case where the total claim does not exceed \$15,000, exclusive of interest and arbitration costs. Parties may mutually agree to the expedited procedures in claims in excess of \$15,000. The expedited procedures are summarized as follows:

Rule 54). Notice by Telephone

Both parties shall accept notices of arbitration from the AAA by telephone with forwarding of written notices.

Rule 55). Appointments and Qualifications of Arbitrators

The AAA shall simultaneously submit an identical list of five members of the Construction Arbitration Panel of Arbitrators from which one arbitrator shall be appointed. Each party, on a peremptory basis, may strike any two members from the list. Each party will be notified by telephone of the appointed arbitrator. Either party has seven days after the appointment to submit a written objection of the appointed arbitrator to the AAA.

Rule 56). Time and Place of Hearing

The arbitrator will schedule the date, time and place of the hearing and each party will be notified by the AAA at least seven days in advance of the hearing.

Rule 57). The Hearing

Generally, the hearing and presentations of the parties shall be completed within one day.

Rule 58). Time of Award

Unless otherwise agreed to by the parties, the award shall be rendered not less than five business days from the date of the closing of the hearing. [27]

## CONCLUSIONS

This paper has attempted to provide the reader with an easy access guide reference to better understanding the Navy contract claims procedure. Although the Navy's system has been presented in detail, the general format of the contract claims procedure typifies the process of all the respective Military Departments. The main difference in each military system is the issuance of the respective contracting officer's decisions. A contractor's appeal of a contracting officer's decision still follows the same routes as explained in this paper.

A contractor's claim is the result of two parties, in this case the contractor and the government, agreeing to disagree. Laws and statutes have been written to outline the procedure required to resolve a claim. Contractor claims on construction projects will never be eliminated because contract documents are never perfect and unforeseen conditions will occur. For this reason dispute clauses, which outline the procedure required to resolve claims, have been included in every contract document.

The procedure in resolving contractor claims is really quite simple. The objective is to get an impartial decision on a disagreement in the contract documents that each party accepts. The system attempts to resolve the dispute or claim at the lowest level of authority. The longer a claim remains unresolved the more costly it is to both parties involved. Compromises and negotiated settlements between the two parties are encouraged because of the costs involved



and the chances of losing it all in the appeal process. This way neither party really wins, but more importantly neither party absorbs a large loss.

What has been presented in this paper, is the procedure of resolving claims from the lowest level of authority, the contracting officer, to the highest level of authority, the U.S. Supreme Court. Hopefully, this paper has provided the reader with a better appreciation of the legal process involved in resolving claims. Claims are reviewed and final decisions are rendered on the matter of record submitted with the claim. Typically, the better prepared party wins the claim. Therefore, each construction contract should be administered with the foresight that a claim will result and the best defense to a claim is documentation of the record before a claim is submitted.

### LIST OF REFERENCES

1. "History of the CEC," Civil Engineer Corps Officer School Handout, 1 November 1975, pp. 6702-1 (1 thru 9).
2. "Directory Navy Civil Engineer Corps Officers," NAVFAC P-1, April 1986, p. 35.
3. George P. Cameron III and Philip J. Scaletta, Jr. Business Law, Second Edition, (Texas: Business Pub., 1985), p. 4.
4. Cameron and Scaletta, p. 12.
5. Cameron and Scaletta, p. 12.
6. Cameron and Scaletta, p. 32.
7. Cameron and Scaletta, p. 35.
8. Cameron and Scaletta, pp. 1-90.
9. "Disputes Clause", April 1984.
10. "Contracting Manual", NAVFAC P-68, February 1985, p. 7.4.2.
11. "Defense Contract Audit Agency (DCAA)," Civil Engineer Corps Officer School Handout.
12. U.S. Air Force Institute of Technology, Government Contract Law - Course Text. (Wright Patterson Air Force Base, 1985), p. 16-1.
13. U.S. Air Force Institute of Technology, p. 16-4.
14. U.S. Air Force Institute of Technology, pp. 16-5/6.
15. U.S. Air Force Institute of Technology, pp. 16-8/9.
16. U.S. Air Force Institute of Technology, Appendix E-2.
17. NAVFAC P-68, p. 7.4.2.
18. NAVFAC P-68, p. 1.4.3.
19. NAVFAC P-68, pp. 1.4.5/6.
20. NAVFAC P-68, pp. 7.4.1-7.4.6.
21. NAVFAC P-68, pp. 7.4.7/8.
22. Rear Admiral Kenneth P. Sears, "Navy Construction Claims Procedure," Construction Claims Monthly, May 1981, Vol. 3, No. 5, pp. 1&7.

23. "Agency Board of Contract Appeals," Contract Disputes Act of 1978, Sec. 8 (g) (1).
24. "Armed Services Board of Contract Appeals," Defense Federal Acquisition Regulation, 1984, pp. A:1 thru A:26.
25. Joseph T. Bockrath, Contract, Specifications & Law for Engineers, (New York: McGraw Hill, 1986), p. 463.
26. Bockrath, p. 465.
27. Justin Sweet, Legal Aspects of Architecture Engineering and the Construction Process, Third Edition, (Minnesota: West Publishing Co, 1985), Appendix F - "Construction Industry Arbitration Rules," pp. 959-967.

## BIBLIOGRAPHY

"Armed Services Board of Contract Appeals," Defense Federal Acquisition Regulation, Appendix A, 1984.

Bockrath, Joseph T. Contract, Specification & Law for Engineers, New York: McGraw Hill, 1986.

Cameron, George P. III and Philip J. Scaletta, Jr. Business Law, Second Edition. Plano, Texas: Business Publications, 1985.

Contract Disputes Act of 1978.

"Contracting Manual," NAVFAC P-68, February 1985.

"Defense Contract Audit Agency (DCAA)", Civil Engineer Corps Officer School Handout.

"Directory Navy Civil Engineer Corps Officers," NAVFAC P-1, April 1986.

"Disputes Clause," April 1984.

"History of the CEC," Civil Engineer Corps Officer School Handout, 1 November 1975, pp. 6702-1 (1 thru 9).

"Processing of Contractor Claims," SOUTHNAVFACENGCOMINST 4365.1 9 May 1985.

"Protests, Disputes and Appeals, Part 33," Federal Acquisition Regulation, 1986.

Richter, Irv and Roy S. Mitchell. Handbook of Construction Law and Claims. Reston, Virginia: Reston Publishing Co, Inc., 1982.

Rubin, Robert A., Sammie D. Guy, Alfred C. Maevis and Virginia Fairweather. Construction, Claims, Analysis, Presentation and Defense. New York: Van Nostrano Reinhold Co., 1983.

Sears, Kenneth P., Rear Admiral. "Navy Construction Claims Procedure," Construction Claims Monthly, May 1981, Vol 3, No. 5.

Sweet, Justin. Legal Aspects of Architecture Engineering and the Construction Process, Third Edition. St. Paul, Minnesota: West Publishing Co., 1985.

"Technical Report Summaries," Defense Technical Information Center. Alexandria, Virginia: Defense Logistic Agency, 10 July 1986.

U.S. Air Force Institute of Technology, Government Contract Law - Course Text. Wright Patterson Air Force Base, Ohio 1985.

## CLAUSES

## 52.233-1 Disputes.

As prescribed in 33.014, insert the following clause in solicitations and contracts unless the conditions in 33.003 apply:

## DISPUTES (APR 1984)

- (a) This contract is subject to the Contract Disputes Act of 1978 (41 U.S.C. 601-613) (the Act).
- (b) Except as provided in the Act, all disputes arising under or relating to this contract shall be resolved under this clause.
- (c) "Claim," as used in this clause, means a written demand or written assertion by one of the contracting parties seeking, as a matter of right, the payment of money in a sum certain, the adjustment or interpretation of contract terms, or other relief arising under or relating to this contract. A claim arising under a contract, unlike a claim relating to that contract, is a claim that can be resolved under a contract clause that provides for the relief sought by the claimant. However, a written demand or written assertion by the Contractor seeking the payment of money exceeding \$50,000 is not a claim under the Act until certified as required by subparagraph (d)(2) below. A voucher, invoice, or other routine request for payment that is not in dispute when submitted is not a claim under the Act. The submission may be converted to a claim under the Act, by complying with the submission and certification requirements of this clause, if it is disputed either as to liability or amount or is not acted upon in a reasonable time.
- (d)(1) A claim by the Contractor shall be made in writing and submitted to the Contracting Officer for a written decision. A claim by the Government against the Contractor shall be subject to a written decision by the Contracting Officer.
- (2) For Contractor claims exceeding \$50,000, the Contractor shall submit with the claim a certification that --
  - (i) The claim is made in good faith.
  - (ii) Supporting data are accurate and complete to the best of the Contractor's knowledge and belief; and
  - (iii) The amount requested accurately reflects the contract adjustment for which the Contractor believes the Government is liable.
- (3) (i) If the Contractor is an individual, the certification shall be executed by that individual.
- (ii) If the Contractor is not an individual, the certification shall be executed by --
  - (A) A senior company official in charge at the Contractor's plant or location involved; or
  - (B) An officer or general partner of the Contractor having overall responsibility for the conduct of the Contractor's affairs.
- (e) For Contractor claims of \$50,000 or less, the Contracting Officer must, if requested in writing by the Contractor, render a decision within 60 days of the request. For Contractor-certified claims over \$50,000, the Contracting Officer must, within 60 days, decide the claim or notify the Contractor of the date by which the decision will be made.
- (f) The Contracting Officer's decision shall be final unless the Contractor appeals or files a suit as provided in the Act.
- (g) The Government shall pay interest on the amount found due and unpaid from (1) the date the Contracting Officer receives the claim (properly certified if required), or (2) the date payment otherwise would be due, if that date is later, until the date of payment. Simple interest on claims shall be paid at the rate, fixed by the Secretary of the Treasury as provided in the Act, which is applicable to the period during which the Contracting Officer receives the claim and then at the rate applicable for each 6-month

period as fixed by the Treasury Secretary during the pendency of the claim.

(h) The Contractor shall proceed diligently with performance of this contract, pending final resolution of any request for relief, claim, appeal, or action arising under the contract, and comply with any decision of the Contracting Officer.

(End of Clause)

(R 7-103.12 1980 JUN)

(R.FPR Temporary Regulation 55-II 1980 JUN)

**Alternate I (APR 1984).** If it is determined under agency procedures, that continued performance is necessary pending resolution of any claim arising under or relating to the contract, substitute the following paragraph (h) for the paragraph (h) of the basic clause:

(h) The Contractor shall proceed diligently with performance of this contract, pending final resolution of any request for relief, claim, appeal, or action arising under or relating to the contract, and comply with any decision of the Contracting Officer.

(AV 7-103.12(h) 1980 JUN)

STATUTES

THE ADMINISTRATIVE DISPUTES ACT OF 1954

(The Anti-Wunderlich Act)

(41 U.S.C. § 321-322)

**§321. LIMITATION OF PLEADING CONTRACT-PROVISIONS RELATING TO FINALITY; STANDARDS OF REVIEW:**

No provision of any contract entered into by the United States, relating to the finality or conclusiveness of any decision of the head of any department or agency or his duly authorized representative or board in a dispute involving a question arising under such contract, shall be pledged in any suit now filed or cases where fraud by such official or his said representative or board is alleged: Provided, however, that any such decision shall be final and conclusive unless the same is fraudulent (so in original. Probably should read "fraudulent"), capricious, or arbitrary or so grossly erroneous as necessary to imply bad faith, or is not supported by substantial evidence. May 11, 1954, c. 199, §1, 68 Stat. 81.

**§322. CONTRACT-PROVISIONS MAKING DECISIONS FINAL ON QUESTIONS OF LAW:**

No Government contract shall contain a provision making final on a question of law the decision of any administrative official, representative, or board. May 11, 1954, c. 199, §2, 68 Stat. 81.

**CONTRACT DISPUTES ACT OF 1978 P.L. 95-563**

(41 USC §601)

As Amended by the Federal Courts Improvement Act of 1982, HR 4482.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Contracts Disputes Act of 1978".

**Definitions**

Sec 2. As used in this Act--

(1) the term "agency head" means the head and any assistant head of an executive agency, and may "upon the designation by" the head of an executive agency include the chief official of any principal division of the agency;

(2) the term "executive agency" means an executive department as defined in section 101 of title 5, United States Code, an independent establishment as defined by section 104 of title 5, United States Code (except that it shall not include the General Accounting Office) a military department as defined by section 102 of title 5, United States Code, and a wholly owned Government corporation as defined by section 846 of title 31, United States Code, the United States Postal Service, and the Postal Rate Commission;

(3) the term "contracting officer" means any person who, by appointment in accordance with applicable regulations, has the authority to enter into and administer contracts and make determinations and findings with respect thereto. The term also includes the authorized representative of the contracting officer, acting within the limits of his authority;

(4) the term "contractor" means a party to a Government contract other than the Government;

(5) the term "Administrator" means the Administrator for Federal Procurement Policy appointed pursuant to the Office of Federal Procurement Policy Act;

(6) the term "agency board" means an agency board of contract appeals established under section 8 of this Act; and

(7) the term "misrepresentation of fact" means a false statement of substantive fact, or any conduct which leads to a belief of a substantive fact material to proper understanding of the matter in hand, made with intent to deceive or mislead.

**Applicability of Law**

Sec 3. (a) Unless otherwise specifically provided herein, this Act applies to any express or implied contract (including those of the non-appropriated fund activities described in sections 1346 and 1491 of title 28, United States Code) entered into by an executive agency for --

(1) the procurement of property, other than real property in being;

(2) the procurement of services;

(3) the procurement of construction, alteration, repair or maintenance of real property; or

(4) the disposal of personal property.

(b) With respect to contracts of the Tennessee Valley Authority, the provisions of this Act shall apply only to those contracts which contain a disputes clause requiring that a contract dispute be resolved through an agency administrative process. Notwithstanding any other provision of this Act, contracts of the Tennessee Valley Authority for the sale of fertilizer or electric power or related to the conduct or operation of the electric power system shall be excluded from the Act.



(c) This Act does not apply to a contract with a foreign government, or agency thereof, or international organization, or subsidiary body thereof, if the head of the agency determines that the application of the Act to the contract would not be in the public interest.

#### Maritime Contracts

Sec 4. Appeals under paragraph g of section 8 and suits under section 10, arising out of maritime contracts, shall be governed by the Act of March 9, 1920, as amended (41 Stat. 525, as amended; 46 U.S.C. 741-752) or the Act of March 3, 1925, as amended (43 Stat. 1112, as amended; 46 U.S.C. 781-790) as applicable, to the extent that those Acts are not inconsistent with this Act.

#### Fraudulent Claims

Sec 5. If a contractor is unable to support any part of his claim and it is determined that such inability is attributable to misrepresentation of fact or fraud on the part of the contractor, he shall be liable to the Government for an amount equal to such unsupported part of the claim in addition to all costs to the Government attributable to the cost of reviewing said part of his claim. Liability under this subsection shall be determined within 6 years of the commission of such misrepresentation of fact or fraud.

#### Decision by the Contracting Officer

Sec 6. (a) All claims by a contractor against the Government relating to a contract shall be in writing and shall be submitted to the contracting officer for a decision. All claims by the Government against a contractor relating to a contract shall be the subject of a decision by the contracting officer. The contracting officer shall issue his decisions in writing, and shall mail or otherwise furnish a copy of the decision to the contractor. The decision shall state the reasons for the decision reached, and shall inform the contractor of his rights as provided in this Act. Specific findings of fact are not required, but if made, shall not be binding in any subsequent proceeding. The authority of this subsection shall not extend to a claim or dispute for penalties or forfeitures prescribed by statute or regulation which another Federal agency is specifically authorized to administer, settle or determine. This section shall not authorize any agency head to settle, compromise or pay or otherwise adjust any claim involving fraud.

(b) The contracting officer's decision on the claim shall be final and conclusive and not subject to review by any forum, tribunal, or Government agency, unless an appeal or suit is timely commenced as authorized by this Act. Nothing in this Act shall prohibit executive agencies from including a clause in Government contracts requiring that pending final decision of an appeal or suit, or final settlement, a contractor shall proceed diligently with performance of the contract in accordance with the Contracting Officer's decision.

(c)(1) A contracting Officer shall issue a decision on any submitted claim of \$50,000 or less within sixty days from his receipt of a written request from the contractor that a decision be rendered within that period. For claims of more than \$50,000, the contractor shall certify that the claim is made in good faith, and that the supporting data are accurate and complete to the best of his knowledge and belief, and that the amount requested accurately reflects the contract adjustment for which the contractor believes the Government is liable.

(2) A contracting officer shall, within sixty days of receipt of a submitted certified claim over \$50,000 --

(A) issue a decision; or

(B) notify the contractor of the time within which a decision will be issued.

(3) The decision of a contracting officer on submitted claims shall be issued within a reasonable time, in accordance with regulations promulgated by the agency, taking into account such factors as the size and complexity of the claim and the adequacy of the information in support of the claim provided by the contractor.

(4) A contractor may request the agency board of contract appeals to direct a contracting officer to issue a decision in a specified period of time, as determined by the board, in the event of undue delay on the part of the contracting officer.

(5) Any failure by the contracting officer to issue a decision on a contract claim within the period required will be deemed to be a decision by the contracting officer denying the claim and will authorize the commencement of the appeal or suit on the claim as otherwise provided in this Act. However, in the event an appeal or suit is so commenced in the absence of a prior decision by the contracting officer, the tribunal concerned may, at its option, stay the proceedings to obtain a decision on the claim by the contracting officer.

### **Contractor's Right of Appeal to Board of Contract Appeals**

SEC 7. Within ninety days from the date of receipt of a contracting officer's decision under section 6, the contractor may appeal such decision to an agency board of contract appeals, as provided in section 8.

### **Agency Boards of Contract Appeals**

SEC 8. (a)(1) Except as provided in paragraph (2) an agency board of contract appeals may be established within an executive agency when the agency head, after consultation with the Administrator, determines from a workload study that the volume of contract claims justifies the establishment of a full-time agency board of at least three members who shall have no other inconsistent duties. Workload studies will be updated at least once every three years and submitted to the Administrator.

(2) The Board of Directors of the Tennessee Valley Authority may establish a board of contract appeals for the Authority of an indeterminate number of members.

(b)(1) Except as provided in paragraph (2), the members of agency boards shall be selected and appointed to serve in the same manner as hearing examiners appointed pursuant to section 3105 title 5 of the United States Code, with an additional requirement that such members shall have had not fewer than five years' experience in public contract law. Full-time members of agency boards serving as such on the effective date of this Act shall be considered qualified. The chairman and vice chairman of each board shall be designated by the agency head from members so appointed. The chairman of each agency board shall receive compensation at a rate equal to that paid a GS-18 under the General Schedule contained in section 5332, United States Code, the vice chairman shall receive compensation at a rate equal to that paid a GS-17 under such General Schedule, and all other members shall receive compensation at a rate equal to that paid a GS-16 under such General Schedule. Such positions shall be in addition to the number of positions which may be placed in GS-16, GS-17, and GS-18 of such General Schedule under existing law.

(2) The Board of Directors of the Tennessee Valley Authority shall establish criteria for the appointment of members to its agency board of contract appeals established in subsection (a)(2), and shall designate a chairman of such board. The chairman of such board shall receive compensation at a rate equal to the daily rate paid of a GS-18 under the General Schedule contained in section 5332, United States Code for each day he is engaged in the actual performance of his duties as a member of such board. All other members of such board shall receive compensation at a rate equal to the daily rate paid a GS-16 under such General Schedule for each day they are engaged in the actual performance of their duties as members of such board.

(c) If the volume of contract claims is not sufficient to justify an agency board under subsection (a) or if he otherwise considers it appropriate, any agency head shall arrange for appeals from decisions by contracting officers of his agency to be decided by a board of contract appeals of another executive agency. In the event an agency head is unable to make such an arrangement with another agency, he shall submit the case to the Administrator for placement with an agency board. The provisions of this subsection shall not apply to the Tennessee Valley Authority.

(d) Each agency board shall have jurisdiction to decide any appeal from a decision of a contracting officer (1) relating to a contract made by its agency, and (2) relating to a contract made by any other agency when such agency or the Administrator has designated the agency board to decide the appeal. In exercising this jurisdiction, the agency board is authorized to grant any relief that would be available to a litigant asserting a contract claim in the Claims Court.

(e) An agency board shall provide, to the fullest extent practicable, informal, expeditious, and inexpensive resolution of disputes, and shall issue a decision in writing or take other appropriate action on each appeal submitted, and shall mail or otherwise furnish a copy of the decision to the contractor and the contracting officer.

(f) The rules of each agency board shall include a procedure for the accelerated disposition of any appeal from a decision of a contracting officer where the amount in dispute is \$50,000 or less. The accelerated procedure shall be applicable at the sole election of only the contractor. Appeals under the accelerated procedure shall be resolved, whenever possible, within one hundred and eighty days from the date the contractor elects to utilize such procedure.

(g)(1) The decision of an agency board of contract appeals shall be final, except that --

(A) a contractor may appeal such a decision to the United States Court of Appeals for the Federal Circuit within one hundred twenty days after the date of receipt of a copy of such decision, or

(B) the agency head, if he determines that an appeal should be taken, and with the prior approval of the Attorney General, transmits the decision of the board of contract appeals to the United States Court of Appeals for the Federal Circuit for judicial review, under section 1295 of title 28, United States Code, as amended herein, within one hundred and twenty days from the date of the agency's receipt of a copy of the board's decision.

(2) Notwithstanding the provisions of paragraph (1), the decision of the board of contract appeals of the Tennessee Valley Authority shall be final, except that --

(A) a contractor may appeal such a decision to a United States district court pursuant to the provisions of section 1337 of title 28, United States Code within one hundred twenty days after the date of receipt of a copy of such decision, or

(B) The Tennessee Valley Authority may appeal the decision to a United States district court pursuant to the provisions of section 1337 of title 28, United States Code, within one hundred twenty days after the date of the decision in any case.

(h) Pursuant to the authority conferred under the Office of Federal Procurement Policy Act, the Administrator is authorized and directed, as may be necessary or desirable to carry out the provisions of this Act, to issue guidelines with respect to criteria for the establishment, functions, and procedures of the agency boards (except for a board established by the Tennessee Valley Authority).

(i) Within one hundred and twenty days from the date of enactment of this Act, all agency boards, except that of the Tennessee Valley Authority, of three or more full-time members, shall develop workload studies.

#### Small Claims

SEC 9. (a) The rules of each agency board shall include a procedure for the expedited disposition of any appeal from a decision of a contracting officer where the amount in dispute is \$10,000 or less. The small claims procedure shall be applicable at the sole election of the contractor.

(b) The small claims procedure shall provide for simplified rules of procedure to facilitate the decision of any appeal thereunder. Such appeals may be decided by a single member of the agency board with such concurrences as may be provided by rule or regulation.

(c) Appeals under the small claims procedure shall be resolved, whenever possible, within one hundred twenty days from the date on which the contractor elects to utilize such procedure.

(d) A decision against the Government or the contractor reached under the small claims procedure shall be final and conclusive and shall not be set aside except in cases of fraud.

(e) Administrative determinations and final decisions under this section shall have no value as precedent for future cases under this Act.

(f) The Administrator is authorized to review at least every three years, beginning with the third year after the enactment of the Act, the dollar amount defined in section 9(a) as a small claim, and based upon economic indexes selected by the Administrator adjust that level accordingly.

### **Actions in Court; Judicial Review of Board Decisions**

SEC 10(a)(1). Except as provided in paragraph (2), and in lieu of appealing the decision of the contracting officer under section 6 to an agency board, a contractor may bring an action directly on the claim in the United States Claims Court, notwithstanding any contract provision, regulation, or rule of law to the contrary.

(2) In the case of an action against the Tennessee Valley Authority, the contractor may only bring an action directly on the claim in a United States district court pursuant to section 1337 of title 28, United States Code, notwithstanding any contract provision, regulation, or rule of law to the contrary.

(3) Any action under paragraph (1) or (2) shall be filed within twelve months from the date of the receipt by the contractor of the decision of the contracting officer concerning the claim, and shall proceed *de novo* in accordance with the rules of the appropriate court.

(b) In the event of an appeal by a contractor or the Government from a decision of any agency board pursuant to section 8, notwithstanding any contract provision, regulation, or rules of law to the contrary, the decision of the agency board on any question of law shall not be final or conclusive, but the decision on any question of fact shall be final and conclusive and shall not be set aside unless the decision is fraudulent, or arbitrary, or capricious, or so grossly erroneous as to necessarily imply bad faith, or if such decision is not supported by substantial evidence.

(c) In any appeal by a contractor or the Government from a decision of an agency board pursuant to section 8, the court may render an opinion and judgment and remand the case for further action by the agency board or by the executive agency as appropriate, with such direction as the court considers just and proper.

(d) If two or more suits arising from one contract are filed in the Claims Court and one or more agency boards, for the convenience of parties or witnesses or in the interest of justice, the Claims Court may order the consolidation of such suit in the court or transfer any suits to or among the agency boards involved.

(e) In any suit filed pursuant to this Act involving two or more claims, counterclaims, cross-claims, or third-party claims, and where a portion of one such claim can be divided for purposes of decision or judgment, and in any such suit where multiple parties are involved, the court, whenever such action is appropriate, may enter a judgment as to one or more but fewer than all of the claims, portions thereof, or parties.

### Subpoena, Discovery, and Deposition

SEC 11. A member of an agency board of contract appeals may administer oaths to witnesses, authorize depositions and discovery proceedings, and require by subpoena the attendance of witnesses, and production of books and papers, for the taking of testimony or evidence by deposition or in the hearing of an appeal by the agency board. In case of contumacy or refusal to obey a subpoena by a person who resides, is found, or transacts business within the jurisdiction of the United States district court, the court, upon application of the agency board through the Attorney General, or upon application by the board of contract appeals of the Tennessee Valley Authority, shall have jurisdiction to issue the person an order requiring him to appear before the agency board or a member thereof, to produce evidence or to give testimony, or both. Any failure of any such person to obey the order of the court may be punished by the court as a contempt thereof.

### Interest

SEC 12. Interest on amounts found due contractors on claims shall be paid to the contractor from the date the contracting officer receives the claim pursuant to section 6(a) from the contractor until payment thereof.

The interest provided for in this section shall be paid at the rate established by the Secretary of the Treasury pursuant to Public Law 92-41 (85 Stat. 97) for the Renegotiation Board.

## Part 4. Claims

## 7-401 DEFINITIONS.

(a) Claim. "Claim" means a written demand by one of the contracting parties seeking, as a legal right, the payment of money, adjustment or interpretation of contract terms, or other relief arising under or related to the contract. A voucher, invoice, or other routine request for payment that is not in dispute when submitted is not a claim for the purposes of the Act. However, where such submission is subsequently disputed either as to liability or amount or not acted upon in a reasonable time, it may be converted to a claim. A claim by a contractor seeking payment in excess of \$50,000 must be certified as required by the Contract Disputes Act (See 7-404(c)).

(b) Armed Services Board of Contract Appeals (ASBCA). An independent tribunal established in the Office of the Secretary of Defense and recognized by statute, to hear and adjudicate appeals from Contracting Officer Final Decisions. (See 7-409).

(c) Command Award and Review Board ("Chief's Board"). An informal Board at NAVFACHQ reporting directly to the Commander, NAVFAC, instituted for the purpose of attempting to negotiate settlement of claims at the Headquarters level prior to issuance of a Contracting Officer Final Decision.

7-402 REPORTS. The definition of "claim" in 6-210.1 is only for purposes of the reports required by 6-210.

## 7-403 TIMELY ACTIONS.

(a) The timely processing and resolution of contractor disputes is essential to sound contract administration. Failure to act in a timely manner frequently results in excessive costs to the Government because of the transfer of knowledgeable personnel, loss of records, loss of memories and similar factors. In addition, contractors may be entitled to receive interest payments on those disputes where their position prevails at the Armed Services Board of Contract Appeals. The EFD Contracts Division shall maintain an up-to-date log of all pending disputes within the EFD (including subordinate offices) and shall assure that disputes are processed in a timely manner. This includes promptly requesting DCAA audit for claims over \$500,000. (See 7-313 concerning audits and 6-210 concerning reports.)

(b) Some contractors routinely request a Contracting Officer's Decision whenever they file a request for adjustment. When such a request is received, the contractor should be advised that, inasmuch as the Contract Disputes Act requires that such requests be promptly resolved, the request for a Final Decision may preclude negotiation at the OICC/ROICC level, so that if the Contractor wishes to discuss the matter at the OICC/ROICC level, the Contractor should in writing ask that the request for Final Decision be withdrawn or held in abeyance pending further discussion.

(c) Whenever a claim, as defined above, is in an amount under \$50,000, the Contracting Officer is under a statutory mandate to issue a Final Decision within 60 days. Therefore, expeditious compliance with 7-404 is essential.

# **7-404 PROCEDURES FOR PROCESSING CLAIMS AND REQUESTS FOR EQUITABLE ADJUSTMENT.**

(a) When a request for adjustment has been received by the ROICC and any required audit has been obtained (see 7-313), then within the limits of delegated authority the OICC/ROICC should promptly review the request and conduct negotiations if appropriate. If the request is deemed to be without merit, or if negotiations do not result in agreement, the Contractor is to be promptly advised in writing of denial and the basis therefore. The denial should close with the following language:

"The OICC has determined that you have not presented sufficient justification or data to warrant the contract adjustment you have requested. If you disagree with this determination, you may request a decision of the Contracting Officer pursuant to the provisions of the disputes clause of your contract. Such requests should be forwarded via this office. You may submit additional information and you may request that the previous correspondence concerning this matter be forwarded to the Contracting Officer for further review and determination. This letter is not a Final Decision of the Contracting Officer."

(b) At no time shall the term "final decision" be used in correspondence between subordinate activities and the contractor. Under no circumstances shall the contractor be advised to appeal disputes and other matters directly to the GAO, the ASBCA, or any forum other than the Contracting Officer.

(c) If the Contractor requests a Final Decision and the claim exceeds \$50,000 the ROICC shall obtain from the Contractor a statement required by the Contract Disputes Act as follows:

"I certify that the claim is made in good faith, that the supporting data are accurate and complete to the best of my knowledge and belief; and that the amount requested accurately reflects the contract adjustment for which the contractor believes the Government is liable."

If the Contractor refuses to submit such certification, the ROICC shall advise the Contractor in writing that, by law, (41 USC 605) a claim in excess of \$50,000 cannot be considered until such certification is provided. A copy of this advice shall be sent to the EFD 02 for inclusion in the EFD contract file.

(d) If the contractor requests a Final Decision after failing to reach an agreement with the OICC, the files, including all documents (pro and con) relating to the claim, shall be promptly forwarded to the EFD 02. If the EFD 02 is of the opinion that negotiations may be appropriate, it should promptly initiate such action. If the EFD concurs with the OICC/ROICC that a Final Decision should be issued, the EFD 02 shall promptly process the claim as provided in 7-405 or 7-406. Within the ROICC/OICC/EFD, only one preliminary letter of denial of any request for equitable adjustment shall be issued. The claim is in excess of the final decision authority of the EFD (see 1-402). If the EFD has attempted to conduct negotiations but settlement has not been reached, the EFD should advise the Contractor: that due to the failure of negotiations, pursuant to his earlier request, the claim is being forwarded to the Contracting Officer, for issuance of a Final Decision.

(e) For information, at Headquarters, the Commander, NAVFACENGCOM, has delegated authority to execute and issue Final Decisions only to the Assistant Commander for Contracts (02), and the Director, Contracts Division (021).

(f) Small Claims. Many times claims are forwarded for a Contracting Officer's decision which involve small sums of money or insignificant time extensions. The administrative costs incurred in the processing of such claims by the OICC staff, the EFD and NAVFACENGCOM personnel frequently exceed the value of the claim. Accordingly, Commanders are requested to take every reasonable action to resolve claims and time extensions involving \$2,000 or less. Only those small claims where settlement would be unconscionable or would result in the establishment of an unacceptable precedent should be forwarded for a Contracting Officer's Final Decision.

(g) Once a matter is in dispute, at the request of Counsel, contract administration and other personnel often prepare memoranda or notes pertaining to a claim. In order to minimize the possibility that such memoranda, notes, etc., will subsequently be obtained by the contractor through "discovery" procedures at the Armed Services Board of Contract Appeals or Claims Court Litigation, the following legend be stamped on each page of such memoranda, notes, etc.:

**"ATTORNEY-CLIENT PRIVILEGE-FOR OFFICIAL USE ONLY**

This document is prepared for use by Government attorneys in connection with a contractor claim. It is not to be released outside the Government, or to Government personnel not having a need-to-know".

**7-405 EFD CONTRACTING OFFICER FINAL DECISIONS (33.0)**

7-405.1 Decisions on Disputes of \$250,000 or Less. Pursuant to the authority delegated in 1-402 and 1-403(c), Contracting Officer final decisions on disputes of \$250,000 or less will be issued by the EFD. In issuing such decisions, the following guidelines and criteria apply:

(a) On receipt, all contractor claims shall be forwarded to the EFD Code 02. That office shall maintain a log of all claims and assure their timely and appropriate disposition. This log shall include the persons involved in providing technical advice, the dates various actions are taken and the date of any appeals.

(b) For the purpose of this section, the value of a dispute is the sum of the amount of payment the contractor seeks, plus the value of any liquidated damages that would be released by any time extension sought in connection with the dispute.

(c) It is essential that any Government counter-claims that arise from the same factual situation as the contractor's claim be addressed in the same final decision. When the Government has a counter-claim, contact NAVFAC for a determination as to who will issue the final decision.



(d) If the claim will be decided by the EFD, Code 02 shall conduct a preliminary review of the claim with a representative of Counsel and technical advisors as appropriate. A schedule for the disposition of the claim shall be established which will include furnishing to Code 02 by Counsel and designated technical personnel, legal and technical memoranda on the merits and weaknesses of both the contractor and Navy positions.

(e) As much time as possible shall be afforded legal and technical personnel for the preparation of the memoranda cited above. However, the claim disposition schedule shall assure disposition within 60 days as required by FAR 33.001(c) and the Contracts Disputes Act (41 USC 605(c)(1)).

(f) On receipt of the legal and technical memoranda, if the claim is to be denied in toto or in part, the designated 02 representative shall prepare a draft final decision and, after review for technical and legal adequacy, present it to the appropriate executing official for final review and execution.

(g) After the final decision is issued, the claim file (not contract file) will be forwarded to Counsel. The file shall be retained by Counsel for not less than 14 months to assure its availability in connection with any appeal that may be filed with the ASBCA or the Claims Court.

**7-405.2 Legal and Technical Memoranda.** Legal and technical memoranda shall address both sides of the issues relative to the decision. The purpose of such memoranda is to assist the deciding authority in reaching an appropriate decision, not to decide the issue. Accordingly, all concerned shall assure that the pro's and con's of both the Government and contractor positions are fairly and accurately set forth and analyzed.

**7-405.3 Preparation and Content of Final Decisions.** Pursuant to FAR 33.011(d), a Contracting Officer's final decision must advise the contractor as to the decision reached by the Contracting Officer and the basis therefore. In order to fulfill this requirement, a lengthy detailed decision is not necessary. Decisions should:

(a) Succinctly state the contractor's claim (e.g., You claim additional compensation in the amount of \$15,000 for additional work in connection with the construction of a retaining wall).

(b) State the decision reached (e.g., the Contracting Officer determines that your claim should be allowed in the amount of \$500.00 and denied as to the remainder).

(c) State the basis of the Contracting Officer's decision (e.g., the retaining wall requirements are set forth in detail, No. 2 Drawing, 12345. The work performed by you was only as set forth in that detail with the exception of the north wing wall for which the Contracting Officer determines you are entitled to an additional \$500.00. The basis of computation of the \$500.00 is set forth in enclosure (1)).

(d) Lengthy Contracting Officer decisions have little influence on the ASBCA or the Courts in connection with resolving disputes in favor of the Government. However, final decisions, on occasion, make admissions which have been accepted by those bodies to the disadvantage of the Government. Accordingly, final decisions should set forth the information necessary to comply with the FAR requirements and nothing more.

(e) Every final decision shall conclude with the following:

"This is the Final Decision of the Contracting Officer. This Decision may be appealed to the Armed Services Board of Contract Appeals, which is the authorized representative of the Secretary for hearing and determining contract disputes. If you decide to appeal this decision, written notice thereof must be mailed or otherwise furnished to the Armed Services Board of Contract Appeals, 200 Stovall Street, Alexandria, Virginia 22332, within ninety days from the date you received this decision. A copy thereof shall also be furnished to the Contracting Officer from whose decision the appeal is taken, at the address set forth at the head of this letter, Attention: Director, Contracts Division. The notice should indicate that an appeal is intended, should reference this decision, identify the contract by number, and state the amount in dispute. The rules of procedure of the Armed Services Board of Contract Appeals are in the FAR, Appendix A, Part Two. Optional Accelerated Procedures are available in appeals involving \$50,000 or less and Small Claims (expedited) procedures are available in appeals involving \$10,000 or less. In lieu of appealing to the Board of Contract Appeals, you may bring action directly in the U.S. Claims Court within 12 months of the date you receive this decision (except as provided in Section 4 of the Act (Maritime Contracts))."

(f) Final decisions shall be executed: "For Commander, Naval Facilities Engineering Command, Contracting Officer" (see 1-401).

**7-405.4 Deciding Officials.** The EFD Commander shall establish procedures concerning who of the authorized officials on the EFD staff will execute final decisions and what, if any, review in addition to that indicated above will be required. Final decisions should be prepared, reviewed, and executed by experienced personnel who have had no direct involvement with the work in question, or any significant relationship with the contractor and, therefore, are in a position to decide the dispute on an unbiased basis.

**7-405.5 Mailing of Final Decisions.** All final decisions shall be mailed to the contractor by certified mail, return receipt requested. A specific procedure shall be established to assure that the return receipt is obtained and filed in the claim file. Such receipts frequently are important in determining if appeals have been timely filed. A copy of each final decision shall be forwarded to NAVFAC 02.

**7-405.6 Claim Records.** A "claim file" shall be established for each claim. Included therein shall be copies of all correspondence pertaining to the claim, memoranda prepared in connection with disposition of the claim, copies of applicable contract provisions, drawings, and any other materials considered in connection with the disposition of the claim. If the claim is denied in toto or in part, this material need not be duplicated in the official contract file, provided a notation is made in that file that a claim file exists and where it is stored. At the expiration of all appeal periods (presently one year after receipt of the final decision) or following the resolution of any appeals, the claim file shall be returned to and incorporated in the official contract records.

**7-406 INFORMATION FORWARDED FOR CONTRACTING OFFICER'S DECISION.** When a contractor requests a Contracting Officer's decision on a dispute involving more than \$250,000, the EFD shall forward to NAVFAC 02, as expeditiously as possible (and in no event longer than 20 working days after receipt of the request), the following:

(a) A forwarding letter indicating the contract number, the name of the contractor, the amount in dispute (dollars and time), a specific statement of the item or items in dispute, a brief summary of the basis for denial of the claim (do not write a lengthy claim analysis since the supporting records normally form the sole basis of the Contracting Officer's decision), identification of the person or persons best informed in the event it is necessary to obtain additional information, and any specific details the EFD considers should be highlighted.

(b) A copy of all correspondence concerning the dispute between the EFD, OICC, ROICC and the contractor.

(c) Complete supporting documentation concerning the dispute. As a minimum this will include the complete contract, the drawings pertaining to the dispute, any Board Reports, memoranda for files, and inspection reports concerning the dispute. Omission of documents which tend to support a contractor position usually results in a Government defeat at the ASBCA, since the Government trial attorney will not have been able to present the Government case in such a manner as to minimize the effect of such documents.

(d) An analysis of the validity of the price and time claimed by the contractor, even though the EFD may recommend total denial. In many instances, resolution of claims has been delayed because claims found generally to have merit could not be resolved in the absence of supporting documentation concerning the validity of the price or time extensions requested.

(e) If the contractor is claiming in excess of \$500,000 a copy of the DCAA audit report on the claim, provided, that if an audit has been requested but not yet received, the file may be forwarded to NAVFACENGCOM with a statement that the audit report has been requested and will be forwarded upon receipt.

(f) If the contractor is in bankruptcy, include the name and address of the Trustee in Bankruptcy as soon as available. If the contractor is a corporation, and responsible personnel are no longer available, also include the name and address of the corporation's registered agent for service of process in its state of incorporation or the state of contract performance if the corporation is licensed to do business there. This may normally be obtained from the Secretary of State or the Commissioner of Corporations of the state. This is so that the Contracting Officer can establish legal receipt of any Final Decision and start the appeal period.

#### **7-407 REMAND BY NEGOTIATION**

(a) After review of the documentation and other material submitted to NAVFAC for Final Decision on a claim, it may be determined that a decision denying the claim is not in the best interest of the Government. When NAVFAC returns a claim to the EFD for the negotiated settlement, the following principals apply.

(b) Under no circumstances is such a remand to be construed as an order to settle the claim at any price. It is a directive to attempt to reach a reasonable negotiated settlement. It is recognized that on occasion a contractor may adamantly refuse to enter into meaningful negotiations and thereby preclude reaching a settlement.

(c) The Board Report prepared to support a negotiated settlement must explain any differences between that settlement and the DCAA Audit Report, and between that settlement and the Government estimate. It is not necessary that the settlement amount be within the Government estimate or within the DCCA Audit Report findings, but that any difference be explained and the amount justified. See 6-215 for reporting requirements on such issues.

(d) In the event a reasonable negotiated settlement cannot be reached, a report setting forth specific reasons why an agreement could not be reached and the claim shall be returned to NAVFAC. In such a situation the Contracting Officer may issue a decision which allows reasonable costs. Accordingly, detailed data on "should cost" (i.e., what costs the contractor should have incurred) should be included.

**7-408 COMMAND CONTRACT AWARD AND REVIEW BOARD.** The great majority of the decisions of the Contracting Officer are rendered on the basis of the record; that is, the correspondence and other data which have been forwarded to NAVFACENGCOM by the contractor and the OICC. In a few instances, the contractor requests a hearing before the NAVFACENGCOM Contract Award and Review Board on his claim. (OICC's should not offer such hearings.) The Board is composed of experienced military and civilian personnel selected for their general knowledge of technical matters that may assist in resolution of the claim.

**7-408.1 CONTRACT AWARD AND REVIEW BOARD PROCEDURES.** - The procedures for hearing claims by the Command Board are informal in nature. Ordinarily no verbatim transcript for the testimony is taken. Exhibits offered to the Board should be numbered and listed. Participants are not sworn, however, the statutory penalties of 18 U.S.C. 1001 apply to any false statements made.

(a) Prior to the Board hearing, NAVFAC Code 02 representatives may meet with counsel, contractor and EFD representatives for the purpose of narrowing the issues and developing stipulations of undisputed matters. The parties may be requested to provide outlines or summaries to assist the Board.

(b) The contractor is permitted full freedom to present its position in any reasonable manner. Representatives may be selected to present the claim; attorneys, witnesses and experts may present such documents as is necessary to sustain any position. During the course of the presentation, and subsequent thereto, Board Members may ask questions in respect to some particular aspect of the contractor's claim. The EFD representatives will not be permitted to ask questions of the contractor at this time. The EFD representatives will, of necessity, have to take meticulous notes during the course of the contractor's presentation in order to have clearly before them any points they may later wish to refute.

(c) After the contractor's presentation, the EFD will be requested to set forth its position as to why the contractor's claim should be denied. During this presentation, questioning will be restricted to the Board Members. To assure that the Division's position is presented in both an articulate and comprehensive manner the following should be considered:

(1) The EFD should designate a spokesman who has thorough knowledge of the claim and is able to speak forcefully in presenting it. The spokesman may be an officer, a civilian engineer, a contract administrator, or legal counsel.

(2) The spokesman should have the responsibility for thoroughly preparing and organizing the Division presentation. At the minimum, a detailed outline should be prepared listing points to be established, evidence, and arguments.

(3) All crucial points should be supported by appropriate proof, i.e., correspondence, photographs, inspector's reports, samples of materials, calculation sheets, or other data. All pertinent Division, OICC, and ROICC records should be available at the hearing. Relevant documents should be marked by tabs for expeditious reference if needed. Where there are several crucial documents involved in the discussion, they should be reproduced so a complete file can be given to each Board Member. Witnesses should be present who can describe the work and events on the basis of personal knowledge. Good judgment must be exercised in that the Division should not have representatives who do not have the proper background, are reticent to speak out, or tend to talk too much. If a vital witness cannot be present, the witness should write a complete description of the events that transpired, as he understands them, with appropriate reference to other correspondence, specifications, drawings, etc. Where drawings or other forms of pictorial representation will help clarify the matter under consideration, the Division shall prepare appropriate sketches of sites, construction details, etc.

(4) It is important that the Division recognize the contractor's strong points. When points must be conceded, it should be done without putting the contractor to the time and effort of proving them. The Division should direct its efforts to explain why such points are not determinative of the matters in dispute.

(5) Even though the Division considers the claim to be without merit, the personnel present for the hearing must be prepared and qualified to represent the Division on matters of price and time.

(c) At completion of the contractor and Division presentations, the Board normally will briefly adjourn in order to determine whether there are any areas it desires to have further clarified by either Division personnel or the contractor. Also, an opportunity will normally be afforded to Division and contractor personnel to challenge any points raised by the other side, during the course of its presentation.

At the completion of such discussions, the Board will recess to consider the merits of the contractor's claim. Depending on the nature of the claim, the recess may be a few minutes or extend to a period of days. If an extended recess is anticipated, contractor and EFD personnel normally will depart subject to recall of the Board.

**7-408.2 Board Decisions.** After consideration of the contractor's and EFD's presentations, the Board will reconvene and advise the contractor of its decision. Frequently, the Board determines that the contractor is entitled to some additional compensation or time extension but not all that has been requested. In such instances, the Board will attempt to negotiate a settlement with the contractor at that time. Accordingly, EFD personnel normally must be present during the negotiations and should be prepared to discuss price and time. After completion of the hearing, a contracting officer's decision will be issued if the parties have been unable to satisfactorily resolve the claim. If agreement has been reached, the EFD will be directed to issue a change order pursuant to the terms of the agreement.

**7-409 ARMED SERVICES BOARD CONTRACT APPEALS (ASBCA).** Within 90 days from receipt of a Contracting Officer's Final Decision, a contractor may appeal to the ASBCA. Approximately 50 to 75 percent of the Contracting Officer's decisions denying contractor claims are appealed to the ASBCA. Accordingly, EFD personnel should assure that proper records and notes are maintained even though a claim has been denied by the Contracting Officer, since it is highly possible that personnel having direct knowledge of the claim may be called to testify before the ASBCA. Direct communication is authorized between the Government Trial Attorney and Government personnel who have information or are potential witnesses. Trial Attorneys are not authorized to settle claims without the consent of NAVFACENGCOM 02 or the individual that signed the Final Decision, or to direct the issuance of change orders. Once a Final Decision is issued, Government personnel are not to discuss any claim with non-Government personnel, or with Government personnel not having a valid need-to-know, without the authorization of the Trial Attorney or NAVFACENGCOM 021.

**7-410 CLAIMS COURT.** In lieu of appealing a Final Decision to the ASBCA within 90 days from the date of receipt of a Final Decision, a contractor may initiate a suit in the Claims Court within one year from receipt of the Decision. A contractor may also petition the Court of Appeals for the Federal Circuit to review an adverse ASBCA decision within 120 days of the ASBCA decision. The Justice Department presents the Government's case in these Courts and personnel may be contacted for assistance by Justice attorney3.

**7-411 SUPPORT OF TRIAL COUNSEL.** The Government's position at the Command Award and Review Board and the ASBCA is presented by NAVFAC or EFD Counsel or by the Litigation Division of the Office of the General Counsel of the Navy, and at the Claims Court by the Department of Justice. Regardless of the forum, Government attorneys will require the wholehearted support of all echelons of NAVFAC. This includes inspection and administration personnel personally associated with the contract performance, and persons possessing special technical knowledge. NAVFAC policy is that once the decision has been made by the Contracting Officer to have a claim proceed to a hearing, all NAVFAC personnel, at all echelons, will fully support the trial attorneys, making available all witnesses and experts who may be required, and avoiding any other commitments which might interfere with such persons' availability. The constraints resulting from diminished personnel resources are recognized, but cannot be allowed to interfere with the adequacy of presentation; the results of inadequate presentation are too costly.

**7-412 Approvals of Settlements in Excess of \$250,000.** All proposed claim settlements in excess of \$250,000 will be forwarded to NAVFAC, Code 021, for approval. As a minimum the settlement proposal will include the documentation identified in paragraph 7-406. The memorandum recommending settlement shall clearly identify the claim issues and the basis of the entitlement determination. Quantum justification is to be supported by price or cost analysis.

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PART 33 -- PROTESTS, DISPUTES AND APPEALS  
SUBPART 33.1 -- PROTESTS

33.103 Protests to the Agency.

(a) A determination to proceed with award prior to resolving the protest under FAR 33.103 shall be made at a higher level within the contracting activity than the contracting officer who is to execute the contract.

(b) Contracting officers shall consider all protests after award addressed only to the contracting activity. If protest is oral and the matter cannot be resolved, written confirmation of the protest shall be requested. The protester shall be notified in writing of the final decision on the written protest. The contract file should be documented with essentially the same items as listed in FAR 33.104 (a) (2). Other persons, including bidders, involved in or affected by the protest shall be given notice of the protest and its basis in appropriate cases. These persons shall also be advised that they may submit their views and relevant information to the contracting officer within a specified period of time. Normally, the time specified will be one week. Since timely action on protests is essential, they should be handled on a priority basis.

33.104 Protests to GAO.

(b) A determination to proceed with award prior to resolving the protest under FAR 33.104 shall be made by the HCA without power of redelegation.

(f) The responsibility to report the action to GAO, required by FAR 33.104 (f), is hereby delegated to the heads of contracting activities without power of redelegation. The HCA shall provide a copy of each report to the GAO to CBM at the time sent to the GAO.

PART 33 -- PROTESTS, DISPUTES AND APPEALS  
SUBPART 33.2 -- DISPUTES AND APPEALS

33.206 Initiation of a claim.

(90) (a) Criteria for submitting, documenting and processing contractor claims.

(1) Some contractors have submitted claims, portions of which, upon review are found to be exaggerated, inflated, or unsupportable. Claims sometimes fail to differentiate between factual and judgmental assertions and to support all assertions with specifically identified evidence. Such submission can delay and frustrate the Navy's claim review analysis and evaluation. Thus, as soon as a claim is received preliminary review should be conducted to determine whether or not adequate documentation exists to commence a full and comprehensive analysis. Accordingly, it is necessary to take steps to promote more readily reviewable claim submissions by establishing requirements for the evidentiary documentation of claims and by requiring responsible contractor officials to certify the claims submitted (see FAR 33.207).

(2) The general criteria for information required to support claim settlement include the existence of a legal basis for entitlement, facts meeting the elements of proof required to support the basis of entitlement, and adequate factual support for the amounts claimed. The Navy should require a proper claim submission on the basis provided in the changes clause, namely, a basis factually demonstrating documented scopes of work correlated to provable instances or categories of government liability. The Navy should, in all cases, require demonstration of causal support and documentation of quantum in as much specificity as the facts will permit.

(3) Claimants should be advised that all claim assertions must be supported by specifically identified evidence (including applicable historical and planned cost and production data from the contractor's books and records), and that opinions, conclusions or judgmental assertions not supported by such evidence, or by a sound and reasonable rationale, which is fully discussed, are without probative value and unacceptable.

(4) An individual SF 1411, Contract Pricing Proposal Cover Sheet, shall be submitted for each element of a contractor's claim at the time of the initial claim submission, for any material revision of the claim and prior to the execution of a settlement agreement on the claim. (See FAR 15.804-6(b) and Table 15-2, Instructions for Submission of a Contract Pricing Proposal.)



(5) Since the burden of proof of a claim rests with the claimant, the Navy should reject any claims which fail to meet any of the requirements set forth in 33.090(a)(4), and consider returning claims which suffer from the defects noted in subparagraph (3) above. Any rejection should be accompanied by an indication to the claimant of the areas or types of deficiencies which form the basis for the rejection. Claimants may be given an opportunity to resubmit such claims in the proper manner, unless it is apparent from the contractor's submission that the claim is without foundation.

(6) If, after resubmission of an initially rejected claim, and through review and evaluation thereof by the Navy, the parties are unable to agree upon a settlement of the claim, the Navy should not normally entertain another claim resubmission. Instead the contracting officer should issue a final decision pursuant to FAR 33.211 determining to what extent, if any, the claim is acceptable and to what extent it should be denied.

(7) Where contractor actions or inactions are likely to result in a claim or to delay timely and equitable resolution of claim issues, or contract performances may be impaired, higher level assistance will be promptly sought.

(8) FAR 33.208 requires the Government to pay interest on certain claims. When it is necessary for the Contracting Officer to obtain additional contract funding in order to honor the Government's obligations in an interest bearing situation, CBM by message. The message should be sent priority precedence, with copy to the appropriate SYSCOM and Project Office. Send a follow-up message every 30 days until funding is provided. The SSIC for these messages is N07130 and the following subject should be used: Contract Settlement with Interest for Unfunded Claim Provision. The message should provide the following data.

- (i) Contract deliverable,
- (ii) Contractor,
- (iii) Contract number,
- (iv) Date of contract settlement,
- (v) Total amount of settlement (Show the appropriation. If more than one appropriation, then apportion the settlement by appropriation.),
- (vi) Date of start of interest penalty,
- (vii) Amount of daily interest (Show the appropriation. If more than one appropriation, then apportion the interest penalty by appropriation.),
- (viii) Additional funds required.
- (ix) Any amplifying information, and
- (x) Name of contracting officer/phone number.

PART 33 -- DISPUTES AND APPEALS  
SUBPART 33.90 -- PROCEDURES

33.9000 Documentation of significant contract events.

(a) General. Proper resolution of contractor claims is dependent upon the adequacy of both the available contractor and Government information concerning the relevant facts. Effective presentation and analysis of a claim requires the contractor to reconstruct events, actions, circumstances and conditions that may have taken place long since. This reconstruction process is complicated by the impact of other past transactions and events that are not germane to the issues involved and must be separated therefrom. Adequate documentation is the key to the Government's ability to verify, qualify or refute matters which a contractor presents in support of, or as the basis of, the contractor's claim.

(b) Applicability. A record of significant events, in accordance with paragraphs (c), (d) and (e) below, shall be maintained by the contract administration office with respect to:

(1) All contracts in excess of \$5,000,000; and

(2) All contracts, regardless of dollar amount, wherein the officer in charge of the contract administration office has determined a reasonable possibility exists that a claim may be asserted thereunder.

(c) Record of significant events. Field contract administration offices shall maintain, on a continuing basis (daily when necessary), a record narrative summarizing significant events as they occur during the performance of each contract specified in paragraph (b) above. The record shall document events as prescribed in paragraph (d) below with the type of information described in paragraph (e) below. The record shall be supplemented by photographs, references to key documents, or other information as necessary and appropriate, to assure a complete and independent record of contractor performance in the event of subsequent claims.

(d) Events to be documented. The significant events documented shall include, but shall not be limited to, those matters which have a bearing upon the following areas:

(1) Delivery schedule changes or problems;

(2) Drawings, designs and specification which are ambiguous, defective or impossible of performance;

(3) Differences in interpretation of contract provisions;

(4) Delay and disruption of contractor effort;

(5) Changes in method or sequence of work;

- (6) Late or defective Government furnished property or information;
- (7) Rejections, rework, waivers and deviations;
- (8) Planned vs. actual performance milestones;
- (9) Delays in Government actions such as processing engineering change proposals, consent to subcontracts and review of technical data;
- (10) Contractor error and non-compliance with contract terms; and
- (11) Any other Government actions or inactions (excluding formal written change orders) which have the effect or requiring the contractor to perform work different from that prescribed by the original terms of the contract.

(e) Type of information. To the extent applicable, the following information concerning each event recorded shall be provided:

- (1) The nature and pertinent circumstances of the event;
- (2) The date of the event and the identification of Government and contractor personnel involved, including name and function of the respective individuals;
- (3) Identification of any relevant document involved;
- (4) The substance of any oral communications; and
- (5) A statement concerning the possible consequences or effects of the event described upon the contract cost, schedule, or technical performance, including manner or sequence of performance.

(f) File maintenance. The records concerning significant events shall be kept in a separate folder or folders for each contract and identified as the "significant events" file. Those records which are already maintained separately as part of the contract file in accordance with FAR Subpart 4.8 need not be included in the Significant Events file. Where pertinent documents needed to complete the record are located elsewhere than in the contract file, copies of such documents or cross-references thereto, shall be included in the significant events file. All non-factual information (i.e., opinions and conclusions expressed by any representative of the contract administration office, and privilege, legal advice of counsel) contained in the significant events file shall be marked "FOR OFFICIAL USE ONLY."

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33.9001 Claims reporting, review, and approval requirements.

(a) Claims reports. Field activities shall immediately report receipt of all claims to the cognizant systems command. Systems commands shall report all contractor claims in excess of \$1 million to CBM no later than one week following receipt of the claim from the contractor. Claim reports will be in the following format:

- (1) Contractor's name.
- (2) Contract number; description of supplies or services; contract price or estimated total cost.
- (3) Date written claim received.
- (4) Amount of claim (e.g., breakdown of quantum for claimed hardcore, delay, disruption, etc.)
- (5) Alleged basis of claim (e.g., various constructive changes, suspensions, late and defective GFI/GFE, etc.)
- (6) Participating activities or agencies (e.g., NAVPRO, SUPSHIP, DCAS, USAF, etc.).
- (7) Assessment of validity of claim where possible.
- (8) Current status.
- (9) Provisional payment.
- (10) Planned handling and disposition of claim.

Reports shall not be delayed to obtain information elements (9) or (10).

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## (b) Report to Congress

(1) The heads of contracting activities will report to the Congress, prior to payment, on the validity of claims settlements over \$5 million when any funds appropriated under Section 747 of the Department of Defense Appropriations Act of 1977 (P.L. 94-419) or Section 848 of the Department of Defense Appropriations Act of 1978 (P.L. 95-111) are obligated in proposed settlement.

(2) To assist in implementation of this requirement, the following points are highlighted:

(i) The term "claim" as used in the report to Congress applies to a wide range of contractual actions including, for instance, requests for equitable adjustment submitted by contractors as a result of unilateral change orders issued by the Government pursuant to the "Changes" clause.

(ii) Provisional price increases or provisional payments against contractor claims are subject to this reporting requirement.

(iii) The \$5,000,000 threshold refers to the proposed settlement amount and not to the claim value as submitted by contractors.

(iv) The report should be made to the Congress when settlement agreement has been reached. Thus, final negotiations with contractors should be prefaced that any offers made by the Navy are subject to the above requirement of making a report to the Congress before they can be accepted with any binding legal effect.

(v) The report format, enclosed with the ASD(I&L) memorandum of 25 Jan 1977 may be used for complying with this requirement. In addition to a copy of each report being forwarded to OASD (Comptroller), a copy of each report will also be furnished to ASN (S&L) and CBM.

(3) Report Control Symbol DD I&L (AR) 1449 is assigned for this requirement.

(c) Claims review and approval. All proposed claim settlements will be reviewed and approved in accordance with the criteria as shown in Table 33-91.

TABLE 33-91 - REVIEW AND APPROVAL CRITERIA

Amount of Claim Settlement	Review	Approval
Less than business clearance dollar value of contracting activity, but not more than \$10 million	Contracting Activity	Contracting Activity
Business clearance dollar value or higher but not more than \$10 million	Navy Claims Board	CBM
More than \$10 million	Navy Claims Board	CBM (with ASN (S&L) concurrence)

(1) Navy Claims Board. Navy Claims Board members shall consist of procurement executives designated by NAVAIR, NAVSEA, and SPAWAR Systems Commands, and the Deputy Chief of Staff for Installations and Logistics, Headquarters, U.S. Marine Corps, and shall be chaired by CBM or his designated representative. The Assistant General Counsel shall be the Navy Claims Board Legal Advisor.

(i) The Navy Claims Board is an advisory board to ASN (S&L). In general, the Navy Claims Board will review contractor claims in accordance with the claims dollar threshold criteria shown in Table 33-91. Navy Claims Board review will not be required in cases on which such review has been waived by CBM.

(ii) For each final decision of the contracting officer denying in whole or in part any claim requiring review by the Navy Claims Board, as prescribed in the subparagraph (i) immediately above, the proposed decision shall be subject to approval by the Chairperson, Navy Claims Board. At the option of a contracting activity any claim or proposed claim settlement or final decision of the contracting officer below the activity's claims dollar threshold shown in Table 33-91 may be submitted to the Navy Claims Board for review or advice. If a proposed settlement is below the activity's claims dollar threshold, the head of the contracting activity is authorized to approve such settlement. If a proposed decision is below the activity's claims dollar threshold but the amount of the contractor's claim exceeds such threshold, the HCA must first obtain clearance from the Chairperson, Navy Claims Board before issuance of the decision. This HCA authority may not be delegated to any official below the level of Deputy or Assistant Commander for Contracts or Director of Contracts Office or Directorate or their deputy.

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(2) Requirements for legal memorandum. The supporting documentation with respect to claim actions submitted to the claims board will include a legal memorandum. As a minimum the required legal memorandum should:

- (i) Analyze the applicability and adequacy of the contractor's legal theory or theories of Government liability;
- (ii) Analyze and evaluate the presence and adequacy of evidentiary facts satisfying the elements of proof required by such legal theory or theories;
- (iii) Analyze the applicability and adequacy of any affirmative defense the Government may have to the contractor's claim, e.g., accord and satisfaction, failure of consideration, fraud, release, laches, statute of limitations; and
- (iv) Analyze and evaluate the presence of any counterclaims the Government may have against the contractor.

(3) Navy Claims Board Chairperson. The Navy Claims Board chairperson shall brief the ASN(S&L) on proposed contractor claim settlements or contracting officer's decisions which are over \$10M. Prior to such briefing, the Navy Claims Board shall review the proposed action to assure that it is factually and contractually supported. The Chairperson, Navy Claims Board, shall prepare a decision paper on proposed claims settlements or final decisions of the contracting officer for approval or disapproval by ASN (S&L).

(4) Commitment and clearance. If ASN (S&L) or CBM review is required, no settlement commitment or final decision shall be made prior to receipt of approval by the official shown in Table 33-91. When a proposed settlement exceeds the contracting activity's clearance dollar threshold, approval of the settlement as shown in Table 33-91 shall constitute CBM business clearance.

(5) Provisional increases in contract prices. Primary emphasis should continue to be given to achieving prompt settlement of claims, thereby obviating need for provisional price increases or payments. Provisional price increases or provisional payments against contractor claims may be made when the following documents have been obtained:

- (i) A legal determination that the contractor is entitled to compensation.
- (ii) Sufficient technical, administrative, and audit analyses to permit such legal determination; and
- (iii) A determination by the contracting officer with respect to the amount of compensation for which there is entitlement and that the amount of ultimate entitlement to compensation will equal or exceed the amount of the provisional price increase or provisional payment.

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(6) Unless otherwise authorized by CBM, when a provisional payment, either individually or cumulatively against a single claim, meets the threshold requirements set forth in Table 33-91, a written justification shall be submitted for approval. The justification shall cover (i) the requirements of the claim (ii) the projected date of settlement of the claim, and (iii) other pertinent information, including comments as to whether the contractor has reasonably satisfied all requests for documentary and analytical support of the claimed amount.

(d) Final claim reports. After a claim is finally settled or disposed of by final contracting officer's decision, the contracting activity, which submitted the initial claim report, shall submit to CBM a final report containing the settlement amount and factual conclusions supporting settlement or contracting officer's decision, as applicable. Comments with respect to lessons learned and corrective actions taken or to be taken to preclude or to minimize the recurrence of the circumstances leading to the claim will be included in the final claim report.

(e) Implementation

(1) Contracting activities shall give wide dissemination to, and implement, these policies and procedures, including establishment of the appropriate delineation of authorities within each activity.

(2) These policies shall apply to all pending and future contractor claims.

(3) Persons and boards required to review the proposed dispositions of contractor claims shall assure that these policies were followed in the processing and evaluation of the claim under review.



33.90-8

33.9002 Contractor appeals to the Armed Services Board of Contract Appeals (ASBCA)

(a) General. The Office of the General Counsel (OGC) has sole litigation authority for all appeals under Navy contracts to the ASBCA. Because of the frequent complexity of these cases, the OGC and the contracting activity involved should maintain the continuity of any Navy claim team which might have investigated and evaluated the contractor's claim submission. Such teams should continue to function in an assisting capacity under the leadership of the OGC Trial Attorney assigned to handle the appeal.

(b) Contracting officer decisions. Copies of all executed contracting officer decisions shall be forwarded, at time of issuance, for appropriate action, to the Litigation Division of the OGC.

(c) Contractor notices of appeal. When a notice of appeal in any form is received by the contracting activity the contracting officer is required by Rule 3 of ASBCA Rules (DFARS, Appendix A) to forward it to the ASBCA. This should be done by contracting activity counsel on behalf of the contracting officer, with a copy to the Litigation Division.

(d) Documentation requirements. The Litigation Division shall be furnished four (4) sets of the documents pertinent to the appeal required by Rule 4 of the ASBCA Rules. The contracting officer shall compile these documents promptly with the advice and assistance of contracting activity counsel. These Rule 4 documents, which at a minimum should include all of the documents relied upon by the contracting officer in reaching a final decision, should be arranged in an orderly fashion (preferably in chronological order), indexed, numbered and tabbed. All pages should be clear and legible. If additional documentation is deemed to be necessary the Litigation Division shall make the request for such documentation and if it is available, the contracting officer shall furnish said documentation with the assistance of contracting activity counsel. Rule 4 requires that the documents be filed within 30 days after receipt of the notice of appeal. If more time is needed the Litigation Division shall be advised so that it may request an extension of time from the ASBCA. Such extensions shall be requested only when necessary and not as a matter of course. In field contracting offices not having assigned counsel, the Litigation Division will work directly with the contracting officer in obtaining the Rule 4 documents. Upon receipt of the Rule 4 documents, the Litigation Division will assume the responsibility for transmitting a copy to the board and for meeting the additional requirements of Rule 4 with reference to the appellant.

(e) Litigation report requirement. With the compilation of Rule 4 documents, a comprehensive litigation report shall be forwarded to the Litigation Division. At a minimum, the report should include:

(1) A detailed narrative statement of facts, preferably in chronological sequence, and with a topical segregation when appropriate, with references to attached supporting documents of expected testimony. If such a statement was previously submitted pursuant to paragraph (d) above, it need not be submitted a second time, but should be supplemented or revised if additional information becomes available in the interim.

(2) An analysis and evaluation (classified as attorney-client privileged information) of the factual and legal positions of both sides (including affirmative defenses and counterclaims available to the Government), the available evidence, and the expertise and effectiveness of prospective witnesses.

(3) The advisory report, if any, of the Review Board or Panel.

(f) Team cooperation. Contracting activities shall cooperate with the Litigation Division in connection with the conduct of an appeal. Arrangements for staff assistance and support in the development of the appeals case shall be effected by agreement among trial attorney, contracting activity counsel and the contracting officer.

(g) Matters for clearance with the contracting officer. The Litigation Division is charged with the responsibility for defending the Navy's case before the ASBCA as contained in the contracting officer's final decision. If, during the processing of an appeal, the Litigation Division Trial Attorney considers that any aspect of the Navy's case, as set forth in the final decision, should be abandoned or substantially modified, the Litigation Division Trial Attorney shall obtain the concurrence of the contracting officer before entering into any stipulation, consent, or other action or disposition with respect to such issue in the appeals deliberations.

(h) Settlement negotiations while appeal is pending before the ASBCA. The conduct of settlement negotiations in connection with any pending appeal should generally be accomplished by selected team consisting of the trial attorney and representatives of the contracting officer (including contracting activity technical personnel, counsel, negotiator, and auditor if necessary). Other arrangements may be made in specific cases as appropriate. However, no final settlement agreement will be made without the written approval of the contracting officer. When a settlement is made, a memorandum shall be prepared by the negotiating team (and signed by all team members) stating the basis and reasons therefor. The settlement agreement shall be drafted by the contracting activity and trial attorney. The trial attorney shall file any legal papers required to be filed with the ASBCA to effect disposition of the case by mutual agreement of the parties.

(i) Appeals case remanded to Navy for quantum determination. In some instances, the ASBCA will determine that the contractor is entitled to compensation with respect to one or more issues addressed in the contracting officer's decision. The ASBCA may then direct that the Navy re-assume responsibility of the claims case for purposes of quantum determination. In all such cases, the contracting officer shall arrange for a negotiating team to be established to reach mutual agreement with the contractor with respect to such issue(s). Since the case no longer is considered a pending appeal, the attorney for the negotiating team shall be appointed by the appropriate contracting activity counsel. No final settlement agreement shall be made without the approval of the contracting officer.

(j) Navy Claims Board reviews. Negotiated settlements of appeals, pending before the ASBCA, as well as negotiated settlements of appeal issues which have been remanded to the Navy for quantum determination, will be subject to review and approval in accordance with the claims dollar threshold criteria shown in Table 33-91.

(k) Contract modification. Whenever contract modification and other contract documents are required to implement a settlement of ASBCA or appellate court decision, they should reference the ASBCA proceedings by title and docket number.

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**ARMED SERVICES BOARD OF CONTRACT APPEALS***Approved 1 May 1962**Revised 1 May 1969**Revised 1 September 1973**Revised 1 July 1979***Part 1—Charter**

1. There is created the Armed Services Board of Contract Appeals which is hereby designated as the authorized representative of the Secretary of Defense, the Secretary of the Army, the Secretary of the Navy and the Secretary of the Air Force, in hearing, considering and determining appeals by contractors from decisions of contracting officers or their authorized representatives or other authorities on disputed questions. These appeals may be taken (a) pursuant to the Contract Disputes Act of 1978 (41 U.S.C. Sect. 601, et seq.), (b) pursuant to the provisions of contracts requiring the decision by the Secretary of Defense or by a Secretary of a Military Department or their duly authorized representative or board, or (c) pursuant to the provisions of any directive whereby the Secretary of Defense or the Secretary of a Military Department has granted a right of appeal not contained in the contract on any matter consistent with the contract appeals procedure. The Board may determine contract disputes for other departments and agencies by agreement. The Board shall operate under general policies established or approved by the Under Secretary of Defense (Research and Engineering).

2. Membership of the Board shall consist of attorneys at law who have been qualified in the manner prescribed by the Contract Disputes Act of 1978. Members of the Board are hereby designated Administrative Judges. There shall be appointed from members of the Board a chairman and two or more vice-chairmen. Appointment of the chairman and vice-chairmen and other members of the Board shall be made by the Under Secretary of Defense (Research and Engineering) and the Assistant Secretaries of the Military Departments responsible for procurement. The chairman and vice-chairmen shall serve in that capacity for a two-year term unless sooner removed or reappointed for an additional term or terms. The Under Secretary will also designate

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the order in which the vice-chairmen will act for the chairman in his absence. In the absence of a vice-chairman, the chairman or acting chairman may designate a member of the Board to serve as a temporary vice-chairman.

3. It shall be the duty and obligation of the members of the Armed Services Board of Contract Appeals to decide appeals on the record of the appeal to the best of their knowledge and ability in accordance with applicable contract provisions and in accordance with law and regulation pertinent thereto.

4. The chairman of the Board shall be responsible for establishing appropriate divisions of the Board to provide for the most effective and expeditious handling of appeals. He shall be responsible for assigning appeals to the divisions for decision without regard to the military department or other procuring agency which entered into the contract. A division may consist of one or more members of the Board. The chairman shall designate one member of each division as the division head. The division heads and the chairman and vice-chairmen shall constitute the senior deciding group of the Board. A majority of the members of a division or of the senior deciding group shall constitute a quorum for the transaction of the business of each, respectively. Decisions of the Board shall be by majority vote of the members of a division participating and the chairman and a vice-chairman, unless the chairman refers the appeal for decision by the senior deciding group. The decision of the Board in cases so referred to the senior deciding group shall be by majority vote of the participating members of that group. The chairman may refer an appeal of unusual difficulty, significant precedential importance, or serious dispute within the normal decision process for decision by the senior deciding group. An appeal involving \$50,000 or less may be decided by a single member or fewer members of the Board than hereinbefore provided for cases of unlimited dollar amount, under accelerated or expedited procedures as provided in the Rules of the Board and the Contract Disputes Act of 1978.

5. The Board shall have all powers necessary and incident to the proper performance of its duties. Subject to the approval of the Under Secretary of Defense (Research and Engineering) and the Assistant Secretaries of the Military Departments responsible for procurement, the Board shall adopt its own methods of procedure, and rules and regulations for its conduct and for the preparation and presentation of appeals and issuance of opinions. The Military Departments and other procuring agencies shall provide legal personnel to prepare and present the contentions of the departments or agencies in relation to appeals filed with the Board. It shall not be necessary for the Board,

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unless it otherwise desires, to communicate with more than one trial attorney in each of the departments or agencies concerning the preparation and presentation of appeals and the obtaining of all records deemed by the Board to be pertinent thereto.

6. Any member of the Board or any examiner, designated by the chairman, shall be authorized to hold hearings, examine witnesses, and receive evidence and argument for consideration and determination of the appeal by the designated division. A member of the Board shall have authority to administer oaths and issue subpoenas as specified in Section 11 of the Contract Disputes Act of 1978. The chairman may request orders of the court in cases of contumacy or refusal to obey a subpoena in the manner prescribed in that Section.

7. The Chairman shall be responsible for the internal organization of the Board and for its administration. He shall provide within approved ceilings for the staffing of the Board with non-member personnel, including hearing examiners, as may be required for the performance of the functions of the Board. The chairman shall appoint a recorder of the Board. Such personnel shall be responsible to and shall function under the direction, supervision and control of the chairman.

8. The Board will be serviced by the Department of the Army for administrative support for its operations as required. Administrative support will include budgeting, funding, fiscal control, manpower control and utilization, personnel administration, security administration, supplies, and other administrative services. The Departments of the Army, Navy, Air Force and the Office of the Secretary of Defense will participate in financing the Board's operations on an equal basis and to the extent determined by the Assistant Secretary of Defense (Comptroller). The cost of processing appeals for departments and agencies other than those in the Department of Defense will be reimbursed.

9. The chairman of the Board will furnish the Secretary of Defense and to the Secretaries of the Military Departments by October 31 of each year a report containing an account of the Board's transactions and proceedings for

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the preceding fiscal year. Within 30 days following the close of a calendar quarter, the chairman shall forward a report of the Board's proceedings for the quarter to the Under Secretary of Defense (Research and Engineering), the Assistant Secretaries of the Military Departments responsible for procurement, and to the Director of the Defense Logistics Agency. Such reports shall disclose the number of appeals received, cases heard, opinions rendered, current reserve of pending matters, and such other information as may be required.

10. The Board shall have a seal bearing the following inscription: "Armed Services Board of Contract Appeals." This seal shall be affixed to all authentications of copies of records and to such other instruments as the Board may determine.

11. This revised charter is *effective April 21, 1980.*

**APPROVED:**

W. GRAHAM CLAYTOR, JR.  
*Deputy Secretary of Defense*

CLIFFORD L. ALEXANDER, JR.  
*Secretary of the Army*

E. HIDALGO  
*Secretary of the Navy*

HANS M. MARK  
*Secretary of the Air Force*

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**ARMED SERVICES BOARD OF CONTRACT APPEALS****Part 2—Rules***Approved 15 July 1963**Revised 1 May 1969**Revised 1 September 1973**Revised 30 June 1980***PREFACE****I. JURISDICTION FOR CONSIDERING APPEALS**

The Armed Services Board of Contract Appeals (referred to herein as the Board) shall consider and determine appeals from decisions of contracting officers pursuant to the Contract Disputes Act of 1978 (Public Law 95-563, 41 U.S.C. 601-613) relating to contracts made by (i) the Departments of Defense, Army, Navy and Air Force or (ii) any other executive agency when such agency or the Administrator for Federal Procurement Policy has designated the Board to decide the appeal.

**II. LOCATION AND ORGANIZATION OF THE BOARD**

(a) The Board's address is Hoffman Building #2, 200 Stovall Street, Alexandria, Virginia 22332, telephone (202) 325-9070.

(b) The Board consists of a chairman, two or more vice chairmen, and other members, all of whom are attorneys at law duly licensed by a state, commonwealth, territory, or the District of Columbia. Board members are designated Administrative Judges.

(c) There are a number of divisions of the Armed Services Board of Contract Appeals, established by the Chairman of the Board in such manner as to provide for the most effective and expeditious handling of appeals. The Chairman and a Vice Chairman of the Board act as members of each division. Appeals are assigned to the divisions for decision without regard to the military department or other procuring agency which entered into the contract involved. Hearing may be held by a designated member (Administrative Judge), or by a duly authorized examiner. Except for appeals processed under the expedited or accelerated procedure, the decision of a majority of a division constitutes the decision of the Board, unless the chairman refers the appeal to the Board's Senior Deciding Group (consisting of the chairman, vice chairmen and all division heads), in which event a decision of a majority of that group constitutes the decision of the Board.



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Appeals referred to the Senior Deciding Group are those of unusual difficulty, significant precedential importance, or serious dispute within the normal division decision process. For decisions of appeals processed under the expedited or accelerated procedure, see Rules 12.2(c) and 12.3(b).

**PRELIMINARY PROCEDURES****1. Appeals, How Taken**

(a) Notice of an appeal shall be in writing and mailed or otherwise furnished to the Board within 90 days from the date of receipt of a contracting officer's decision. A copy thereof shall be furnished to the contracting officer from whose decision the appeal is taken.

(b) Where the contractor has submitted a claim of \$50,000 or less to the contracting officer and has requested a written decision within 60 days from receipt of the request, and the contracting officer has not done so, the contractor may file a notice of appeal as provided in subparagraph (a) above, citing the failure of the contracting officer to issue a decision.

(c) Where the contractor has submitted a properly certified claim over \$50,000 to the contracting officer or has requested a decision by the contracting officer which presently involves no monetary amount pursuant to the Disputes clause, and the contracting officer has failed to issue a decision within a reasonable time, taking into account such factors as the size and complexity of the claim, the contractor may file a notice of appeal as provided in subparagraph (a) above, citing the failure of the contracting officer to issue a decision.

(d) Upon docketing of appeals filed pursuant to (b) or (c) hereof, the Board may, at its option, stay further proceedings pending issuance of a final decision by the contracting officer within such period of time as is determined by the Board.

(e) In lieu of filing a notice of appeal under (b) or (c) hereof, the contractor may request the Board to direct the contracting officer to issue a decision in a specified period of time, as determined by the Board, in the event of undue delay on the part of the contracting officer.

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**ARMED SERVICES BOARD OF CONTRACT APPEALS****2. Notice of Appeal, Contents of**

A notice of appeal should indicate that an appeal is being taken and should identify the contract (by number), the department and/or agency involved in the dispute, the decision from which the appeal is taken, and the amount in dispute, if known. The notice of appeal should be signed personally by the appellant (the contractor taking the appeal), or by the appellant's duly authorized representative or attorney. The complaint referred to in Rule 6 may be filed with the notice of appeal, or the appellant may designate the notice of appeal as a complaint, if it otherwise fulfills the requirements of a complaint.

**3. Docketing of Appeals**

When a notice of appeal in any form has been received by the Board, it shall be docketed promptly. Notice in writing shall be given to the appellant with a copy of these rules, and to the contracting officer.

**4. Preparation, Content, Organization, Forwarding, and Status of Appeal File**

(a) *Duties of Contracting Officer* - Within 30 days of receipt of an appeal, or notice that an appeal has been filed, the contracting officer shall assemble and transmit to the Board an appeal file consisting of all documents pertinent to the appeal, including:

- (1) the decision from which the appeal is taken;
- (2) the contract, including pertinent specifications, amendments, plans and drawings;
- (3) all correspondence between the parties relevant to the appeal, including the letter or letters of claim in response to which the decision was issued;
- (4) transcripts of any testimony taken during the course of proceedings, and affidavits or statements of any witnesses on the matter in dispute made prior to the filing of the notice of appeal with the Board; and
- (5) any additional information considered relevant to the appeal.

**ARMED SERVICES PROCUREMENT REGULATION**

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Within the same time above specified the contracting officer shall furnish the appellant a copy of each document he transmits to the Board, except those in subparagraph (a)(2) above. As to the latter, a list furnished appellant indicating specific contractual documents transmitted will suffice.

(b) *Duties of the Appellant* - Within 30 days after receipt of a copy of the appeal file assembled by the contracting officer, the appellant shall transmit to the Board any documents not contained therein which he considers relevant to the appeal, and furnish two copies of such documents to the government trial attorney.

(c) *Organization of Appeal File* - Documents in the appeal file may be originals or legible facsimiles or authenticated copies, and shall be arranged in chronological order where practicable, numbered sequentially, tabbed, and indexed to identify the contents of the file.

(d) *Lengthy Documents* - Upon request by either party, the Board may waive the requirement to furnish to the other party copies of bulky, lengthy, or out-of-size documents in the appeal file when inclusion would be burdensome. At the time a party files with the Board a document as to which such a waiver has been granted he shall notify the other party that the document or a copy is available for inspection at the offices of the Board or of the party filing same.

(e) *Status of Documents in Appeal File* - Documents contained in the appeal file are considered, without further action by the parties, as part of the record upon which the Board will render its decision. However, a party may object, for reasons stated, to consideration of a particular document or documents reasonably in advance of hearing or, if there is no hearing, of settling the record. If such objection is made, the Board shall remove the document or documents from the appeal file and permit the party offering the document to move its admission as evidence in accordance with Rules 13 and 20.

(f) Notwithstanding the foregoing, the filing of the Rule 4(a) and (b) documents may be dispensed with by the Board either upon request of the appellant in his notice of appeal or thereafter upon stipulation of the parties.

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**ARMED SERVICES BOARD OF CONTRACT APPEALS****5. Motions**

(a) Any motion addressed to the jurisdiction of the Board shall be promptly filed. Hearing on the motion shall be afforded on application of either party. However, the Board may defer its decision on the motion pending hearing on both the merits and the motion. The Board shall have the right at any time and on its own initiative to raise the issue of its jurisdiction to proceed with a particular case, and shall do so by an appropriate order, affording the parties an opportunity to be heard thereon.

(b) The Board may entertain and rule upon other appropriate motions.

**6. Pleadings**

(a) *Appellant* - Within 30 days after receipt of notice of docketing of the appeal, the appellant shall file with the Board an original and two copies of a complaint setting forth simple, concise and direct statements of each of its claims. Appellant shall also set forth the basis, with appropriate reference to contract provisions, of each claim and the dollar amount claimed, to the extent known. This pleading shall fulfill the generally recognized requirements of a complaint, although no particular form is required. Upon receipt of the complaint, the Board shall serve a copy of it upon the Government. Should the complaint not be received within 30 days, appellant's claim and appeal may, if in the opinion of the Board the issues before the Board are sufficiently defined, be deemed to set forth its complaint and the Government shall be so notified.

(b) *Government* - Within 30 days from receipt of the complaint, or the aforesaid notice from the Board, the Government shall prepare and file with the Board an original and two copies of an answer thereto. The answer shall set forth simple, concise and direct statements of Government's defenses to each claim asserted by appellant, including any affirmative defenses available. Upon receipt of the answer, the Board shall serve a copy upon appellant. Should the answer not be received within 30 days, the Board may, in its discretion, enter a general denial on behalf of the Government, and the appellant shall be so notified.

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(c) A party who intends to raise an issue concerning the law of a foreign country shall give notice in his pleadings or other reasonable written notice. The Board, in determining foreign law, may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under Rules 11, 13 or 20. The determination of foreign law shall be treated as a ruling on a question of law.

**7. Amendments of Pleadings or Record**

The Board upon its own initiative or upon application by a party may order a party to make a more definite statement of the complaint or answer, or to reply to an answer. The Board may, in its discretion, and within the proper scope of the appeal, permit either party to amend its pleading upon conditions fair to both parties. When issues within the proper scope of the appeal, but not raised by the pleadings, are tried by express or implied consent of the parties, or by permission of the Board, they shall be treated in all respects as if they had been raised therein. In such instances, motions to amend the pleadings to conform to the proof may be entered, but are not required. If evidence is objected to at a hearing on the ground that it is not within the issues raised by the pleadings, it may be admitted within the proper scope of the appeal, provided, however, that the objecting party may be granted a continuance if necessary to enable it to meet such evidence.

**8. Hearing Election**

After filing of the Government's answer or notice from the Board that it has entered a general denial on behalf of the Government, each party shall advise whether it desires a hearing as prescribed in Rules 17 through 25, or whether it elects to submit its case on the record without a hearing, as prescribed in Rule 11.

**9. Prehearing Briefs**

Based on an examination of the pleadings, and its determination of whether the arguments and authorities addressed to the issues are adequately set forth therein, the Board may, in its discretion, require the parties to submit prehearing briefs in any case in which a hearing has been

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elected pursuant to Rule 8. If the Board does not require prehearing briefs either party may, in its discretion and upon appropriate and sufficient notice to the other party, furnish a prehearing brief to the Board. In any case where a prehearing brief is submitted, it shall be furnished so as to be received by the Board at least 15 days prior to the date set for hearing, and a copy shall simultaneously be furnished to the other party as previously arranged.

**10. Prehearing or Presubmission Conference**

(a) Whether the case is to be submitted pursuant to Rule 11, or heard pursuant to Rules 17 through 25, the Board may upon its own initiative, or upon the application of either party, arrange a telephone conference or call upon the parties to appear before an administrative judge or examiner of the Board for a conference to consider:

- (1) simplification, clarification, or severing of the issues;
- (2) the possibility of obtaining stipulations, admissions, agreements and rulings on admissibility of documents, understandings on matters already of record, or similar agreements that will avoid unnecessary proof;
- (3) agreements and rulings to facilitate discovery;
- (4) limitation of the number of expert witnesses, or avoidance of similar cumulative evidence;
- (5) the possibility of agreement disposing of any or all of the issues in dispute; and
- (6) such other matters as may aid in the disposition of the appeal.

(b) The administrative judge or examiner of the Board shall make such rulings and orders as may be appropriate to aid in the disposition of the appeal. The results of pre-trial conferences, including any rulings and orders, shall be reduced to writing by the administrative judge or examiner and this writing shall thereafter constitute a part of the record.

**11. Submission Without a Hearing**

Either party may elect to waive a hearing and to submit its case upon the record before the Board, as settled pursuant to Rule 13. Submission of a case without hearing does

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not relieve the parties from the necessity of proving the facts supporting their allegations or defenses. Affidavits, depositions, admissions, answers to interrogatories, and stipulations may be employed to supplement other documentary evidence in the Board record. The Board may permit such submissions to be supplemented by oral argument (transcribed if requested), and by briefs arranged in accordance with Rule 23.

12. Optional SMALL CLAIMS (EXPEDITED) and ACCELERATED Procedures

These procedures are available solely at the election of the appellant.

12.1 Elections to Utilize SMALL CLAIMS (EXPEDITED) and ACCELERATED Procedures

(a) In appeals where the amount in dispute is \$10,000 or less, the appellant may elect to have the appeal processed under a SMALL CLAIMS (EXPEDITED) procedure requiring decision of the appeal, whenever possible, within 120 days after the Board receives written notice of the appellant's election to utilize this procedure. The details of this procedure appear in section 12.2 of this Rule. An appellant may elect the ACCELERATED procedure rather than the SMALL CLAIMS (EXPEDITED) procedure for any appeal eligible for the SMALL CLAIMS (EXPEDITED) procedure.

(b) In appeals where the amount in dispute is \$50,000 or less, the appellant may elect to have the appeal processed under an ACCELERATED procedure requiring decision of the appeal, whenever possible, within 180 days after the Board receives written notice of the appellant's election to utilize this procedure. The details of this procedure appear in section 12.3 of this Rule.

(c) The appellant's election of either the SMALL CLAIMS (EXPEDITED) procedure or the ACCELERATED procedure may be made by written notice within 60 days after receipt of notice of docketing, unless such period is extended by the Board for good cause. The election may not be withdrawn except with permission of the Board and for good cause.

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**ARMED SERVICES BOARD OF CONTRACT APPEALS****12.2 The SMALL CLAIMS (EXPEDITED) Procedure**

(a) In cases proceeding under the SMALL CLAIMS (EXPEDITED) procedure, the following time periods shall apply:

(1) Within 10 days from the Government's first receipt from either the appellant or the Board of a copy of the appellant's notice of election of the SMALL CLAIMS (EXPEDITED) procedure, the Government shall send the Board a copy of the contract, the contracting officer's final decision, and the appellant's claim letter or letters, if any; remaining documents required under Rule 4 shall be submitted in accordance with times specified in that rule unless the Board otherwise directs.

(2) Within 15 days after the Board has acknowledged receipt of appellant's notice of election, the assigned administrative judge shall take the following actions, if feasible, in an informal meeting or a telephone conference with both parties: (i) identify and simplify the issues; (ii) establish a simplified procedure appropriate to the particular appeal involved; (iii) determine whether either party wants a hearing, and if so, fix a time and place therefor; (iv) require the Government to furnish all the additional documents relevant to the appeal; and (v) establish an expedited schedule for resolution of the appeal.

(b) Pleadings, discovery, and other prehearing activity will be allowed only as consistent with the requirement to conduct the hearing on the date scheduled, or if no hearing is scheduled, to close the record on a date that will allow decisions within the 120-day limit. The Board, in its discretion, may impose shortened time periods for any actions prescribed or allowed under these rules, as necessary to enable the Board to decide the appeal within the 120-day limit, allowing whatever time, up to 30 days, that the Board considers necessary for the preparation of the decision after closing the record and the filing of briefs, if any.

(c) Written decision by the Board in cases processed under the SMALL CLAIMS (EXPEDITED) procedure will be short and contain only summary findings of fact and conclusions. Decisions will be rendered for the Board by a single administrative judge. If there has been a hearing, the administrative judge presiding at the hearing may, in the judge's discretion, at the conclusion of the hearing and after entertaining such



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oral arguments as deemed appropriate, render on the record oral summary findings of fact, conclusions, and a decision of the appeal. Whenever such an oral decision is rendered, the Board will subsequently furnish the parties a typed copy of such oral decision for record and payment purposes and to establish the starting date for the period for filing a motion for reconsideration under Rule 29.

(d) A decision against the Government or the contractor shall have no value as precedent, and in the absence of fraud shall be final and conclusive and may not be appealed or set aside.

**12.3 The ACCELERATED Procedure**

(a) In cases proceeding under the ACCELERATED procedure, the parties are encouraged, to the extent possible consistent with adequate presentation of their factual and legal positions, to waive pleadings, discovery, and briefs. The Board, in its discretion, may shorten time periods prescribed or allowed elsewhere in these Rules, including Rule 4, as necessary to enable the Board to decide the appeal within 180 days after the Board has received the appellant's notice of election of the ACCELERATED procedure, and may reserve 30 days for preparation of the decision.

(b) Written decision by the Board in cases processed under the ACCELERATED procedure will normally be short and contain only summary findings of fact and conclusions. Decisions will be rendered for the Board by a single administrative judge with the concurrence of a vice chairman, or by a majority among these two and the chairman in case of disagreement. Alternatively, in cases where the amount in dispute is \$10,000 or less as to which the ACCELERATED procedure has been elected and in which there has been a hearing, the single administrative judge presiding at the hearing may, with the concurrence of both parties, at the conclusion of the hearing and after entertaining such oral arguments as deemed appropriate, render on the record oral summary findings of fact, conclusions, and a decision of the appeal. Whenever such an oral decision is rendered, the Board will subsequently furnish the parties a typed copy of such oral decision for record and payment purposes, and to establish the starting date for the period for filing a motion for reconsideration under Rule 29.

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**ARMED SERVICES BOARD OF CONTRACT APPEALS****12.4 Motions for Reconsideration in Rule 12 Cases**

Motions for Reconsideration of cases decided under either the SMALL CLAIMS (EXPEDITED) procedure or the ACCELERATED procedure need not be decided within the original 120-day or 180-day limit, but all such motions shall be processed and decided rapidly so as to fulfill the intent of this Rule.

**13. Settling the Record**

(a) The record upon which the Board's decision will be rendered consists of the documents furnished under Rules 4 and 12, to the extent admitted in evidence, and the following items, if any: pleadings, prehearing conference memoranda or orders, prehearing briefs, depositions or interrogatories received in evidence, admissions, stipulations, transcripts of conferences and hearings, hearing exhibits, post-hearing briefs, and documents which the Board has specifically designated be made a part of the record. The record will, at all reasonable times, be available for inspection by the parties at the office of the Board.

(b) Except as the Board may otherwise order in its discretion, no proof shall be received in evidence after completion of an oral hearing or, in cases submitted on the record, after notification by the Board that the case is ready for decision.

(c) The weight to be attached to any evidence of record will rest within the sound discretion of the Board. The Board may in any case require either party, with appropriate notice to the other party, to submit additional evidence on any matter relevant to the appeal.

**14. Discovery - Depositions**

(a) *General Policy and Protective Orders* - The parties are encouraged to engage in voluntary discovery procedures. In connection with any deposition or other discovery procedure, the Board may make any order required to protect a party or person from annoyance, embarrassment, or undue burden or expense. Those orders may include limitations on the scope, method, time and place for discovery, and provisions for protecting the secrecy of confidential information or documents.

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JUNIOR OFFICER'S GUIDE TO UNDERSTANDING THE NAVY  
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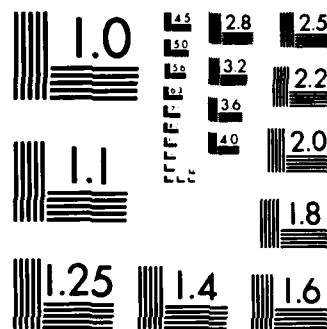
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(b) *When Depositions Permitted* - After an appeal has been docketed and complaint filed, the parties may mutually agree to, or the Board may, upon application of either party, order the taking of testimony of any person by deposition upon oral examination or written interrogatories before any officer authorized to administer oaths at the place of examination, for use as evidence or for purpose of discovery. The application for order shall specify whether the purpose of the deposition is discovery or for use as evidence.

(c) *Orders on Depositions* - The time, place, and manner of taking depositions shall be as mutually agreed by the parties, or failing such agreement, governed by order of the Board.

(d) *Use as Evidence* - No testimony taken by depositions shall be considered as part of the evidence in the hearing of an appeal until such testimony is offered and received in evidence at such hearing. It will not ordinarily be received in evidence if the deponent is present and can testify at the hearing. In such instances, however, the deposition may be used to contradict or impeach the testimony of the deponent given at the hearing. In cases submitted on the record, the Board may, in its discretion, receive depositions to supplement the record.

(e) *Expenses* - Each party shall bear its own expenses associated with the taking of any deposition.

(f) *Subpoenas* - Where appropriate, a party may request the issuance of a subpoena under the provisions of Rule 21.

**15. Interrogatories to Parties, Admission of Facts, and Production and Inspection of Documents**

After an appeal has been docketed and complaint filed with the Board, a party may serve on the other party:

(a) written interrogatories to be answered separately in writing, signed under oath and answered or objected to within 45 days after service; (b) a request for the admission of specified facts and/or the authenticity of any documents, to be answered or objected to within 45 days after service; the factual statements and the authenticity of the documents to be deemed admitted upon failure of a party to respond to the request; and (c) a request for the production, inspection and

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copying of any documents or objects not privileged, which reasonably may lead to the discovery of admissible evidence, to be answered or objected to within 45 days after service. The Board may allow a shorter or longer time. Any discovery engaged in under this Rule shall be subject to the provisions of Rule 14(a) with respect to general policy and protective orders, and of Rule 35 with respect to sanctions.

**16. Service of Papers Other Than Subpoenas**

Papers shall be served personally or by mail, addressed to the party upon whom service is to be made. Copies of complaints, answers and briefs shall be filed directly with the Board. The party filing any other paper with the Board shall send a copy thereof to the opposing party, noting on the paper filed with the Board that a copy has been so furnished. Subpoenas shall be served as provided in Rule 21.

**HEARINGS****17. Where and When Held**

Hearings will be held at such places determined by the Board to best serve the interests of the parties and the Board. Hearings will be scheduled at the discretion of the Board with due consideration to the regular order of appeals, Rule 12 requirements, and other pertinent factors. On request or motion by either party and for good cause, the Board may, in its discretion, adjust the date of a hearing.

**18. Notice of Hearings**

The parties shall be given at least 15 days notice of the time and place set for hearings. In scheduling hearings, the Board will consider the desires of the parties and the requirement for just and inexpensive determination of appeals without unnecessary delay. Notices of hearings shall be promptly acknowledged by the parties.

**19. Unexcused Absence of a Party**

The unexcused absence of a party at the time and place set for hearing will not be occasion for delay. In the event of such absence, the hearing will proceed and the case will be regarded as submitted by the absent party as provided in Rule 11.

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**ARMED SERVICES BOARD OF CONTRACT APPEALS****20. Hearings: Nature, Examination of Witnesses**

(a) *Nature of Hearings* - Hearings shall be as informal as may be reasonable and appropriate under the circumstances. Appellant and the Government may offer such evidence as they deem appropriate and as would be admissible under the Federal Rules of Evidence or in the sound discretion of the presiding administrative judge or examiner. Stipulations of fact agreed upon by the parties may be regarded and used as evidence at the hearing. The parties may stipulate the testimony that would be given by a witness if the witness were present. The Board may require evidence in addition to that offered by the parties.

(b) *Examination of Witnesses* - Witnesses before the Board will be examined orally under oath or affirmation, unless the presiding administrative judge or examiner shall otherwise order. If the testimony of a witness is not given under oath, the Board may advise the witness that his statements may be subject to the provisions of Title 18, United States Code, sections 287 and 1001, and any other provision of law imposing penalties for knowingly making false representations in connection with claims against the United States or in any matter within the jurisdiction of any department or agency thereof.

**21. Subpoenas**

(a) *General* - Upon written request of either party filed with the recorder, or on his own initiative, the administrative judge to whom a case is assigned or who is otherwise designated by the chairman may issue a subpoena requiring:

- (i) testimony at a deposition - the deposing of a witness in the city or county where he resides or is employed or transacts his business in person, or at another location convenient for him that is specifically determined by the Board;
- (ii) testimony at a hearing - the attendance of a witness for the purpose of taking testimony at a hearing; and

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- (iii) production of books and papers - in addition to (i) or (ii), the production by the witness at the deposition or hearing of books and papers designated in the subpoena.

(b) *Voluntary Cooperation* - Each party is expected (i) to cooperate and make available witnesses and evidence under its control as requested by the other party, without issuance of a subpoena, and (ii) to secure voluntary attendance of desired third-party witnesses and production of desired third-party books, papers, documents, or tangible things whenever possible.

(c) *Requests for Subpoenas* -

(1) A request for subpoena shall normally be filed at least:

- (i) 15 days before a scheduled deposition where the attendance of a witness at a deposition is sought; or
- (ii) 30 days before a scheduled hearing where the attendance of a witness at a hearing is sought.

In its discretion the Board may honor requests for subpoenas not made within these time limitations.

(2) A request for a subpoena shall state the reasonable scope and general relevance to the case of the testimony and of any books and papers sought.

(d) *Requests to Quash or Modify* - Upon written request by the person subpoenaed or by a party, made within 10 days after service but in any event not later than the time specified in the subpoena for compliance, the Board may (i) quash or modify the subpoena if it is unreasonable and oppressive or for other good cause shown, or (ii) require the person in whose behalf the subpoena was issued to advance the reasonable cost of producing subpoenaed books and papers. Where circumstances require, the Board may act upon such a request at any time after a copy has been served upon the opposing party.



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**ARMED SERVICES BOARD OF CONTRACT APPEALS****(e) Form; Issuance -**

(1) Every subpoena shall state the name of the Board and the title of the appeal, and shall command each person to whom it is directed to attend and give testimony, and if appropriate, to produce specified books and papers at a time and place therein specified. In issuing a subpoena to a requesting party, the administrative judge shall sign the subpoena and may, in his discretion, enter the name of the witness and otherwise leave it blank. The party to whom the subpoena is issued shall complete the subpoena before service.

(2) Where the witness is located in a foreign country, a letter rogatory or subpoena may be issued and served under the circumstances and in the manner provided in 28 U.S.C. 1781-1784.

**(f) Service -**

(1) The party requesting issuance of a subpoena shall arrange for service.

(2) A subpoena requiring the attendance of a witness at a deposition or hearing may be served at any place. A subpoena may be served by a United States marshal or deputy marshal, or by any other person who is not a party and not less than 18 years of age. Service of a subpoena upon a person named therein shall be made by personally delivering a copy to that person and tendering the fees for one day's attendance and the mileage provided by 28 U.S.C. 1821 or other applicable law; however, where the subpoena is issued on behalf of the Government, money payments need not be tendered in advance of attendance.

(3) The party at whose instance a subpoena is issued shall be responsible for the payment of fees and mileage of the witness and of the officer who serves the subpoena. The failure to make payment of such charges on demand may be deemed by the Board as a sufficient ground for striking the testimony of the witness and the books or papers the witness has produced.

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**ARMED SERVICES BOARD OF CONTRACT APPEALS**

(g) *Contumacy or Refusal to Obey a Subpoena* - In case of contumacy or refusal to obey a subpoena by a person who resides, is found, or transacts business within the jurisdiction of a United States District Court, the Board will apply to the Court through the Attorney General of the United States for an order requiring the person to appear before the Board or a member thereof to give testimony or produce evidence or both. Any failure of any such person to obey the order of the Court may be punished by the Court as a contempt thereof.

**22. Copies of Papers**

When books, records, papers, or documents have been received in evidence, a true copy thereof or of such part thereof as may be material or relevant may be substituted therefor, during the hearing or at the conclusion thereof.

**23. Post-Hearing Briefs**

Post-hearing briefs may be submitted upon such terms as may be directed by the presiding administrative judge or examiner at the conclusion of the hearing.

**24. Transcript of Proceedings**

Testimony and argument at hearings shall be reported verbatim, unless the Board otherwise orders. Waiver of transcript may be especially suitable for hearings under Rule 12.2. Transcripts of the proceedings shall be supplied to the parties at such rates as may be established by contract between the Board and the reporter, provided that ordinary copy of transcript shall be supplied to the appellant at an amount no greater than the cost of duplication.

**25. Withdrawal of Exhibits**

After a decision has become final the Board may, upon request and after notice to the other party, in its discretion permit the withdrawal of original exhibits, or any part thereof, by the party entitled thereto. The substitution of true copies of exhibits or any part thereof may be required by the Board in its discretion as a condition of granting permission for such withdrawal.

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**ARMED SERVICES BOARD OF CONTRACT APPEALS****REPRESENTATION****26. The Appellant**

An individual appellant may appear before the Board in person, a corporation by one of its officers; and a partnership or joint venture by one of its members; or any of these by an attorney at law duly licensed in any state, commonwealth, territory, the District of Columbia, or in a foreign country. An attorney representing an appellant shall file a written notice of appearance with the Board.

**27. The Government**

Government counsel may, in accordance with their authority, represent the interest of the Government before the Board. They shall file notices of appearance with the Board, and notice thereof will be given appellant or appellant's attorney in the form specified by the Board from time to time.

**DECISIONS****28. Decisions**

(a) Decisions of the Board will be made in writing and authenticated copies of the decision will be forwarded simultaneously to both parties. The rules of the Board and all final orders and decisions (except those required for good cause to be held confidential and not cited as precedents) shall be open for public inspection at the offices of the Board. Decisions of the Board will be made solely upon the record, as described in Rule 13.

(b) Any monetary award to a contractor by the Board shall be promptly paid in accordance with the procedures provided by section 1302 of the Act of July 27, 1956 (70 Stat. 694, as amended; 31 U.S.C. 724a). To assure prompt payment the Recorder will forward a waiver form to each party with the decision. If the parties do not contemplate an appeal or motion for reconsideration, they will execute waivers which so state, and return them to the Recorder. The Recorder will forward the waivers and a certified copy of the award decision to the General Accounting Office for certification for payment.

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**ARMED SERVICES BOARD OF CONTRACT APPEALS****MOTION FOR RECONSIDERATION**29. Motion for Reconsideration

A motion for reconsideration may be filed by either party. It shall set forth specifically the grounds relied upon to sustain the motion. The motion shall be filed within 30 days from the date of the receipt of a copy of the decision of the Board by the party filing the motion.

**SUSPENSIONS, DISMISSALS AND DEFAULTS: REMANDS**30. Suspensions; Dismissal Without Prejudice

The Board may suspend the proceedings by agreement of counsel for settlement discussions, or for good cause shown. In certain cases, appeals docketed before the Board are required to be placed in a suspense status and the Board is unable to proceed with disposition thereof for reasons not within the control of the Board. Where the suspension has continued, or may continue, for an inordinate length of time, the Board may, in its discretion, dismiss such appeals from its docket without prejudice to their restoration when the cause of suspension has been removed. Unless either party or the Board acts within three years to reinstate any appeal dismissed without prejudice, the dismissal shall be deemed with prejudice.

31. Dismissal or Default for Failure to Prosecute or Defend

Whenever a record discloses the failure of either party to file documents required by these rules, respond to notices or correspondence from the Board, comply with orders of the Board, or otherwise indicates an intention not to continue the prosecution or defense of an appeal, the Board may, in the case of a default by the appellant, issue an order to show cause why the appeal should not be dismissed or, in the case of a default by the Government, issue an order to show cause why the Board should not act thereon pursuant to Rule 35. If good cause is not shown, the Board may take appropriate action.

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**ARMED SERVICES BOARD OF CONTRACT APPEALS****32. Remand from Court**

Whenever any court remands a case to the Board for further proceedings, each of the parties shall, within 20 days of such remand, submit a report to the Board recommending procedures to be followed so as to comply with the court's order. The Board shall consider the reports and enter special orders governing the handling of the remanded case. To the extent the court's directive and time limitations permit, such orders shall conform to these rules.

**TIME, COMPUTATION AND EXTENSIONS****33. Time, Computation and Extensions**

(a) Where possible, procedural actions should be taken in less time than the maximum time allowed. Where appropriate and justified, however, extensions of time will be granted. All requests for extensions of time shall be in writing.

(b) In computing any period of time, the day of the event from which the designated period of time begins to run shall not be included, but the last day of the period shall be included unless it is a Saturday, Sunday, or a legal holiday, in which event the period shall run to the end of the next business day.

**EX PARTE COMMUNICATIONS****34. Ex parte Communications**

No member of the Board or of the Board's staff shall entertain, nor shall any person directly or indirectly involved in an appeal, submit to the Board or the Board's staff, off the record, any evidence, explanation, analysis, or advice, whether written or oral, regarding any matter at issue in an appeal. This provision does not apply to consultation among Board members or to ex parte communications concerning the Board's administrative functions or procedures.

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**ARMED SERVICES BOARD OF CONTRACT APPEALS****SANCTIONS****35. Sanctions**

If any party fails or refuses to obey an order issued by the Board, the Board may then make such order as it considers necessary to the just and expeditious conduct of the appeal.

**EFFECTIVE DATE AND APPLICABILITY****36. Effective Date**

These rules shall apply (i) mandatorily, to all appeals relating to contracts entered into on or after 1 March 1979, and (ii) at the contractor's election, to appeals relating to earlier contracts, with respect to claims pending before the contracting officer on 1 March 1979 or initiated thereafter.

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**ARMED SERVICES BOARD OF CONTRACT APPEALS**

Pursuant to the Charter of the Armed Services Board of Contract Appeals, the attached rules are hereby approved for use and application to appeals to the Armed Services Board of Contract Appeals under the Contract Disputes Act of 1978.

(signed) WILLIAM J. PERRY (30 JUN 1980)  
UNDER SECRETARY OF DEFENSE FOR  
RESEARCH AND ENGINEERING

(signed) PERCY A. PIERRE  
ASSISTANT SECRETARY OF THE ARMY  
(RESEARCH, DEVELOPMENT AND  
ACQUISITION)

(signed) J. A. DOYLE  
ASSISTANT SECRETARY OF THE NAVY  
(MANPOWER, RESERVE AFFAIRS AND  
LOGISTICS)

(signed) EUGENE H. KOPF  
(ACTING) ASSISTANT SECRETARY OF THE AIR FORCE  
(RESEARCH, DEVELOPMENT AND  
LOGISTICS)

# Construction Industry Arbitration Rules\*

AMERICAN CONSULTING  
ENGINEERS COUNCIL

AMERICAN INSTITUTE OF ARCHITECTS

AMERICAN SOCIETY OF  
CIVIL ENGINEERS

AMERICAN SOCIETY OF  
LANDSCAPE ARCHITECTS

AMERICAN SUBCONTRACTORS  
ASSOCIATION

ASSOCIATED BUILDERS AND  
CONTRACTORS, INC.

ASSOCIATED GENERAL CONTRACTORS

ASSOCIATED SPECIALTY  
CONTRACTORS, INC.

CONSTRUCTION SPECIFICATIONS  
INSTITUTE

NATIONAL ASSOCIATION OF  
HOME BUILDERS

NATIONAL SOCIETY OF  
PROFESSIONAL ENGINEERS



American  
Arbitration  
Association

*As amended  
and in effect  
February 1, 1984*

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# Construction Industry Arbitration Rules

## 1. Agreement of Parties

The parties shall be deemed to have made these Rules a part of their arbitration agreement whenever they have provided for arbitration under the Construction Industry Arbitration Rules. These Rules and any amendment thereof shall apply in the form obtaining at the time the arbitration is initiated.

## 2. Name of Tribunal

Any Tribunal constituted by the parties for the settlement of their dispute under these Rules shall be called the Construction Industry Arbitration Tribunal, hereinafter called the Tribunal.

## 3. Administrator

When parties agree to arbitrate under these Rules, or when they provide for arbitration by the American Arbitration Association, hereinafter called AAA, and an arbitration is initiated hereunder, they thereby constitute AAA the administrator of the arbitration. The authority and duties of the administrator are prescribed in the agreement of the parties and in these Rules.

## 4. Delegation of Duties

The duties of the AAA under these Rules may be carried out through Tribunal Administrators, or such other officers or committees as the AAA may direct.

## 5. National Panel of Arbitrators

In cooperation with the National Construction Industry Arbitration Committee, the AAA shall establish and maintain a National Panel of Construction Arbitrators, hereinafter called the Panel, and shall appoint an arbitrator or arbitrators therefrom as hereinafter provided. A neutral arbitrator selected by mutual choice of both parties or their appointees, or appointed by the AAA, is hereinafter called the arbitrator, whereas an arbitrator selected unilaterally by one party is hereinafter called the party-appointed arbitrator. The term arbitrator may hereinafter be used to refer to one arbitrator or to a Tribunal of multiple arbitrators.

## 6. Office of Tribunal

The general office of a Tribunal is the headquarters of the AAA, which may, however, assign the ad-

ministration of an arbitration to any of its Regional Offices.

#### **7. Initiation under an Arbitration Provision in a Contract**

Arbitration under an arbitration provision in a contract shall be initiated in the following manner:

The initiating party shall, within the time specified by the contract, if any, file with the other party a notice of an intention to arbitrate (Demand), which notice shall contain a statement setting forth the nature of the dispute, the amount involved, and the remedy sought; and shall file three copies of said notice with any Regional Office of the AAA, together with three copies of the arbitration provisions of the contract and the appropriate filing fee as provided in Section 48 hereunder.

The AAA shall give notice of such filing to the other party. A party upon whom the demand for arbitration is made may file an answering statement in duplicate with the AAA within seven days after notice from the AAA, simultaneously sending a copy to the other party. If a monetary claim is made in the answer the appropriate administrative fee provided in the Fee Schedule shall be forwarded to the AAA with the answer. If no answer is filed within the stated time, it will be treated as a denial of the claim. Failure to file an answer shall not operate to delay the arbitration.

Unless the AAA in its discretion determines otherwise, the Expedited Procedures of Construction Arbitration shall be applied in any case where the total claim of any party does not exceed \$15,000, exclusive of interest and arbitration costs. Parties may also agree to the Expedited Procedures in cases involving claims in excess of \$15,000. The Expedited Procedures shall be applied as described in Sections 54 through 58 of these Rules.

#### **8. Change of Claim or Counterclaim**

After filing of the claim or counterclaim, if either party desires to make any new or different claim or counterclaim, same shall be made in writing and filed with the AAA, and a copy thereof shall be mailed to the other party who shall have a period of seven days from the date of such mailing within which to file an answer with the AAA. However, after the arbitrator is appointed no new or different claim or counterclaim may be submitted without the arbitrator's consent.

#### **9. Initiation under a Submission**

Parties to any existing dispute may commence an arbitration under these Rules by filing at any Regional Office two copies of a written agreement to arbitrate under these Rules (Submission), signed by the parties. It shall contain a statement of the matter in dispute, the amount of money involved, and the remedy sought, together with the appropriate filing fee as provided in the Fee Schedule.

#### **10. Pre-Hearing Conference and Preliminary Hearing**

At the request of the parties or at the discretion of the AAA, a pre-hearing conference with the administrator and the parties or their counsel will be scheduled in appropriate cases to arrange for an exchange of information and the stipulation of uncontested facts so as to expedite the arbitration proceedings.

In large and complex cases, unless the parties agree otherwise, the AAA may schedule a preliminary hearing with the parties and the arbitrator(s) to establish the extent of and schedule for the production of relevant documents and other information, the identification of any witnesses to be called, and a schedule for further hearings to resolve the dispute.

#### **11. Fixing of Locale**

The parties may mutually agree on the locale where the arbitration is to be held. If any party requests that the hearing be held in a specific locale and the other party files no objection thereto within seven days after notice of the request is mailed to such party, the locale shall be the one requested. If a party objects to the locale requested by the other party, the AAA shall have power to determine the locale and its decision shall be final and binding.

#### **12. Qualifications of Arbitrator**

Any arbitrator appointed pursuant to Section 13 or Section 15 shall be neutral, subject to disqualification for the reasons specified in Section 19. If the agreement of the parties names an arbitrator or specifies any other method of appointing an arbitrator, or if the parties specifically agree in writing, such arbitrator shall not be subject to disqualification for said reasons.

#### **13. Appointment from Panel**

If the parties have not appointed an arbitrator and have not provided any other method of appointment, the arbitrator shall be appointed in the fol-

lowing manner: Immediately after the filing of the Demand or Submission, the AAA shall submit simultaneously to each party to the dispute an identical list of names of persons chosen from the Panel. Each party to the dispute shall have seven days from the mailing date in which to cross off any names to which it objects, number the remaining names to indicate the order of preference, and return the list to the AAA. If a party does not return the list within the time specified, all persons named therein shall be deemed acceptable. From among the persons who have been approved on both lists, and in accordance with the designated order of mutual preference, the AAA shall invite the acceptance of an arbitrator to serve. If the parties fail to agree upon any of the persons named, or if acceptable arbitrators are unable to act, or if for any other reason the appointment cannot be made from the submitted lists, the AAA shall have the power to make the appointment from other members of the Panel without the submission of any additional lists.

#### **14. Direct Appointment by Parties**

If the agreement of the parties names an arbitrator or specifies a method of appointing an arbitrator, that designation or method shall be followed. The notice of appointment, with name and address of such arbitrator, shall be filed with the AAA by the appointing party. Upon the request of any such appointing party, the AAA shall submit a list of members of the Panel from which the party may make the appointment.

If the agreement specifies a period of time within which an arbitrator shall be appointed, and any party fails to make such appointment within that period, the AAA shall make the appointment.

If no period of time is specified in the agreement, the AAA shall notify the parties to make the appointment, and if within seven days after mailing of such notice such arbitrator has not been so appointed, the AAA shall make the appointment.

#### **15. Appointment of Arbitrator by Party-Appointed Arbitrators**

If the parties have appointed their party-appointed arbitrators or if either or both of them have been appointed as provided in Section 14, and have authorized such arbitrator to appoint an arbitrator within a specified time and no appointment is made within such time or any agreed extension thereof,

the AAA shall appoint an arbitrator who shall act as Chairperson.

If no period of time is specified for appointment of the third arbitrator and the party-appointed arbitrators do not make the appointment within seven days from the date of the appointment of the last party-appointed arbitrator, the AAA shall appoint the arbitrator who shall act as Chairperson.

If the parties have agreed that their party-appointed arbitrators shall appoint the arbitrator from the Panel, the AAA shall furnish to the party-appointed arbitrators, in the manner prescribed in Section 13, a list selected from the Panel, and the appointment of the arbitrator shall be made as prescribed in such Section.

#### **16. Nationality of Arbitrator in International Arbitration**

If one of the parties is a national or resident of a country other than the United States, the arbitrator shall, upon the request of either party, be appointed from among the nationals of a country other than that of any of the parties.

#### **17. Number of Arbitrators**

If the arbitration agreement does not specify the number of arbitrators, the dispute shall be heard and determined by one arbitrator, unless the AAA, in its discretion, directs that a greater number of arbitrators be appointed.

#### **18. Notice to Arbitrator of Appointment**

Notice of the appointment of the arbitrator, whether mutually appointed by the parties or appointed by the AAA, shall be mailed to the arbitrator by the AAA, together with a copy of these Rules, and the signed acceptance of the arbitrator shall be filed prior to the opening of the first hearing.

#### **19. Disclosure and Challenge Procedure**

A person appointed as neutral arbitrator shall disclose to the AAA any circumstances likely to affect his or her impartiality, including any bias or any financial or personal interest in the result of the arbitration or any past or present relationship with the parties or their counsel. Upon receipt of such information from such arbitrator or other source, the AAA shall communicate such information to the parties and, if it deems it appropriate to do so, to the arbitrator and others. Thereafter, the AAA shall determine whether the arbitrator

should be disqualified and shall inform the parties of its decision, which shall be conclusive.

#### **20. Vacancies**

If any arbitrator should resign, die, withdraw, refuse, be disqualified or be unable to perform the duties of office, the AAA shall, on proof satisfactory to it, declare the office vacant. Vacancies shall be filled in accordance with the applicable provision of these Rules. In the event of a vacancy in a panel of arbitrators, the remaining arbitrator or arbitrators may continue with the hearing and determination of the controversy, unless the parties agree otherwise.

#### **21. Time and Place**

The arbitrator shall fix the time and place for each hearing. The AAA shall mail to each party notice thereof at least five days in advance, unless the parties by mutual agreement waive such notice or modify the terms thereof.

#### **22. Representation by Counsel**

Any party may be represented by counsel. A party intending to be so represented shall notify the other party and the AAA of the name and address of counsel at least three days prior to the date set for the hearing at which counsel is first to appear. When an arbitration is initiated by counsel, or where an attorney replies for the other party, such notice is deemed to have been given.

#### **23. Stenographic Record**

The AAA shall make the necessary arrangements for the taking of a stenographic record whenever such record is requested by a party. The requesting party or parties shall pay the cost of such record as provided in Section 50.

#### **24. Interpreter**

The AAA shall make the necessary arrangements for the services of an interpreter upon the request of one or both parties, who shall assume the cost of such services.

#### **25. Attendance at Hearings**

Persons having a direct interest in the arbitration are entitled to attend hearings. The arbitrator shall otherwise have the power to require the retirement of any witness or witnesses during the testimony of other witnesses. It shall be discretionary with the arbitrator to determine the propriety of the attendance of any other persons.

#### **26. Adjournments**

The arbitrator may adjourn the hearing, and must take such adjournment when all of the parties agree thereto.

#### **27. Oaths**

Before proceeding with the first hearing or with the examination of the file, each arbitrator may take an oath of office, and if required by law, shall do so. The arbitrator may require witnesses to testify under oath administered by any duly qualified person or, if required by law or demanded by either party, shall do so.

#### **28. Majority Decision**

Whenever there is more than one arbitrator, all decisions of the arbitrators must be by at least a majority. The award must also be made by at least a majority unless the concurrence of all is expressly required by the arbitration agreement or by law.

#### **29. Order of Proceedings**

A hearing shall be opened by the filing of the oath of the arbitrator, where required, and by the recording of the place, time, and date of the hearing, the presence of the arbitrator and parties, and counsel, if any, and by the receipt by the arbitrator of the statement of the claim and answer, if any.

The arbitrator may, at the beginning of the hearing, ask for statements clarifying the issues involved. In some cases, part or all of the above will have been accomplished at the preliminary hearing conducted by the arbitrator(s) pursuant to Section 10.

The complaining party shall then present its claims, proofs and witnesses, who shall submit to questions or other examination. The defending party shall then present its defenses, proofs and witnesses, who shall submit to questions or other examination. The arbitrator may vary this procedure but shall afford full and equal opportunity to the parties for the presentation of any material or relevant proofs.

Exhibits, when offered by either party, may be received in evidence by the arbitrator.

The names and addresses of all witnesses and exhibits in order received shall be made a part of the record.

#### **30. Arbitration in the Absence of a Party or Counsel**

Unless the law provides to the contrary, the arbitra-

tion may proceed in the absence of any party or counsel, who, after due notice, fails to be present or fails to obtain an adjournment. An award shall not be made solely on the default of a party. The arbitrator shall require the party who is present to submit such evidence as is deemed necessary for the making of an award.

### **31. Evidence**

The parties may offer such evidence as is pertinent and material to the controversy and shall produce such additional evidence as the arbitrator may deem necessary to an understanding and determination of the controversy. An arbitrator authorized by law to subpoena witnesses or documents may do so upon the request of any party, or independently.

The arbitrator shall be the judge of the relevance and the materiality of the evidence offered, and conformity to legal rules of evidence shall not be necessary. All evidence shall be taken in the presence of all of the arbitrators and all of the parties, except where any of the parties is absent in default or has waived the right to be present.

### **32. Evidence by Affidavit and Filing of Documents**

The arbitrator may receive and consider the evidence of witnesses by affidavit, giving it such weight as seems appropriate after consideration of any objections made to its admission.

All documents not filed with the arbitrator at the hearing, but arranged for at the hearing or subsequently by agreement of the parties, shall be filed with the AAA for transmission to the arbitrator. All parties shall be afforded opportunity to examine such documents.

### **33. Inspection or Investigation**

An arbitrator finding it necessary to make an inspection or investigation in connection with the arbitration shall direct the AAA to so advise the parties. The arbitrator shall set the time and the AAA shall notify the parties thereof. Any party who so desires may be present at such inspection or investigation. In the event that one or both parties are not present at the inspection or investigation, the arbitrator shall make a verbal or written report to the parties and afford them an opportunity to comment.

### **34. Conservation of Property**

The arbitrator may issue such orders as may be

deemed necessary to safeguard the property which is the subject matter of the arbitration without prejudice to the rights of the parties or to the final determination of the dispute.

### **35. Closing of Hearings**

The arbitrator shall specifically inquire of the parties whether they have any further proofs to offer or witnesses to be heard. Upon receiving negative replies, the arbitrator shall declare the hearings closed and a minute thereof shall be recorded. If briefs are to be filed, the hearings shall be declared closed as of the final date set by the arbitrator for the receipt of briefs. If documents are to be filed as provided for in Section 32 and the date set for their receipt is later than that set for the receipt of briefs, the later date shall be the date of closing the hearing. The time limit within which the arbitrator is required to make an award shall commence to run, in the absence of other agreements by the parties, upon the closing of the hearings.

### **36. Reopening of Hearings**

The hearings may be reopened by the arbitrator at will, or upon application of a party at any time before the award is made. If the reopening of the hearing would prevent the making of the award within the specific time agreed upon by the parties in the contract out of which the controversy has arisen, the matter may not be reopened, unless the parties agree upon the extension of such time limit. When no specific date is fixed in the contract, the arbitrator may reopen the hearings, and the arbitrator shall have thirty days from the closing of the reopened hearings within which to make an award.

### **37. Waiver of Oral Hearings**

The parties may provide, by written agreement, for the waiver of oral hearings. If the parties are unable to agree as to the procedure, the AAA shall specify a fair and equitable procedure.

### **38. Waiver of Rules**

Any party who proceeds with the arbitration after knowledge that any provision or requirement of these Rules has not been complied with and who fails to state an objection thereto in writing, shall be deemed to have waived the right to object.

### **39. Extensions of Time**

The parties may modify any period of time by mutual agreement. The AAA for good cause may

extend any period of time established by these Rules, except the time for making the award. The AAA shall notify the parties of any such extension of time and its reason therefor.

#### **40. Communication with Arbitrator and Serving of Notices**

There shall be no communication between the parties and an arbitrator other than at oral hearings. Any other oral or written communications from the parties to the arbitrator shall be directed to the AAA for transmittal to the arbitrator.

Each party to an agreement which provides for arbitration under these Rules shall be deemed to have consented that any papers, notices or process necessary or proper for the initiation or continuation of an arbitration under these Rules and for any court action in connection therewith or for the entry of judgment on any award made thereunder may be served upon such party by mail addressed to such party or its attorney at the last known address or by personal service, within or without the state wherein the arbitration is to be held (whether such party be within or without the United States of America), provided that reasonable opportunity to be heard with regard thereto has been granted such party.

#### **41. Time of Award**

The award shall be made promptly by the arbitrator and, unless otherwise agreed by the parties, or specified by law, not later than thirty days from the date of closing the hearings, or if oral hearings have been waived, from the date of transmitting the final statements and proofs to the arbitrator.

#### **42. Form of Award**

The award shall be in writing and shall be signed either by the sole arbitrator or by at least a majority if there be more than one. It shall be executed in the manner required by law.

#### **43. Scope of Award**

The arbitrator may grant any remedy or relief which is just and equitable and within the terms of the agreement of the parties. The arbitrator, in the award, shall assess arbitration fees and expenses as provided in Sections 48 and 50 equally or in favor of any party and, in the event any administrative fees or expenses are due the AAA, in favor of the AAA.

#### **44. Award upon Settlement**

If the parties settle their dispute during the course of the arbitration, the arbitrator, upon their request, may set forth the terms of the agreed settlement in an award.

#### **45. Delivery of Award to Parties**

Parties shall accept as legal delivery of the award the placing of the award or a true copy thereof in the mail by the AAA, addressed to such party at its last known address or to its attorney, or personal service of the award, or the filing of the award in any manner which may be prescribed by law.

#### **46. Release of Documents for Judicial Proceedings**

The AAA shall, upon the written request of a party, furnish to such party, at its expense, certified facsimiles of any papers in the AAA's possession that may be required in judicial proceedings relating to the arbitration.

#### **47. Applications to Court and Exclusion of Liability**

(a) No judicial proceedings by a party relating to the subject matter of the arbitration shall be deemed a waiver of the party's right to arbitrate.

(b) Neither the AAA nor any arbitrator in a proceeding under these Rules is a necessary party in judicial proceedings relating to the arbitration.

(c) Parties to these Rules shall be deemed to have consented that judgment upon the award rendered by the arbitrator(s) may be entered in any Federal or State Court having jurisdiction thereof.

(d) Neither the AAA nor any arbitrator shall be liable to any party for any act or omission in connection with any arbitration conducted under these Rules.

#### **48. Administrative Fees**

As a not-for-profit organization, the AAA shall prescribe an administrative fee schedule and a refund schedule to compensate it for the cost of providing administrative services. The schedule in effect at the time of filing or the time of refund shall be applicable.

The administrative fees shall be advanced by the initiating party or parties in accordance with the administrative fee schedule, subject to final apportionment by the arbitrator in the award.

When a matter is withdrawn or settled, the refund shall be made in accordance with the refund schedule.

The AAA, in the event of extreme hardship on the part of any party, may defer or reduce the administrative fee.

#### **49. Fee When Oral Hearings are Waived**

Where all oral hearings are waived under Section 37, the Administrative Fee Schedule shall apply.

#### **50. Expenses**

The expenses of witnesses for either side shall be paid by the party producing such witnesses.

The cost of the stenographic record, if any is made, and all transcripts thereof, shall be prorated equally between the parties ordering copies, unless they shall otherwise agree, and shall be paid for by the responsible parties directly to the reporting agency.

All other expenses of the arbitration, including required traveling and other expenses of the arbitrator and of AAA representatives, and the expenses of any witness or the cost of any proofs produced at the direct request of the arbitrator, shall be borne equally by the parties, unless they agree otherwise, or unless the arbitrator in the award assesses such expenses or any part thereof against any specified party or parties.

#### **51. Arbitrator's Fee**

Unless the parties agree to terms of compensation, members of the National Panel of Construction Arbitrators will serve without compensation for the first two days of service.

Thereafter, compensation shall be based upon the amount of service involved and the number of hearings. An appropriate daily rate and other arrangements will be discussed by the administrator with the parties and the arbitrator(s). If the parties fail to agree to the terms of compensation, an appropriate rate shall be established by the AAA, and communicated in writing to the parties.

Any arrangement for the compensation of an arbitrator shall be made through the AAA and not directly by the arbitrator with the parties. The terms of compensation of neutral arbitrators on a Tribunal shall be identical.

#### **52. Deposits**

The AAA may require the parties to deposit in advance such sums of money as it deems necessary to defray the expense of the arbitration, including the arbitrator's fee, if any, and shall render an accounting to the parties and return any unexpended balance.

#### **53. Interpretation and Application of Rules**

The arbitrator shall interpret and apply these Rules insofar as they relate to the arbitrator's powers and duties. When there is more than one arbitrator and a difference arises among them concerning the meaning or application of any such Rules, it shall be decided by a majority vote. If that is unobtainable, either an arbitrator or a party may refer the question to the AAA for final decision. All other Rules shall be interpreted and applied by the AAA.

### **EXPEDITED PROCEDURES**

#### **54. Notice by Telephone**

The parties shall accept all notices from the AAA by telephone. Such notices by the AAA shall subsequently be confirmed in writing to the parties. Notwithstanding the failure to confirm in writing any notice or objection hereunder, the proceeding shall nonetheless be valid if notice has, in fact, been given by telephone.

#### **55. Appointment and Qualifications of Arbitrators**

The AAA shall submit simultaneously to each party to the dispute an identical list of five members of the Construction Arbitration Panel of Arbitrators, from which one arbitrator shall be appointed. Each party shall have the right to strike two names from the list on a peremptory basis. The list is returnable to the AAA within ten days from the date of mailing. If for any reason the appointment cannot be made from the list, the AAA shall have the authority to make the appointment from among other members of the Panel without the submission of additional lists. Such appointment shall be subject to disqualification for the reasons specified in Section 19. The parties shall be given notice by telephone by the AAA of the appointment of the arbitrator. The parties shall notify the AAA, by telephone, within seven days of any objections to the arbitrator appointed. Any objection by a party to such arbitrator shall be confirmed in writing to the AAA with a copy to the other party(ies).

**56. Time and Place of Hearing**

The arbitrator shall fix the date, time, and place of the hearing. The AAA will notify the parties by telephone, seven days in advance of the hearing date. Formal Notice of Hearing will be sent by the AAA to the parties.

**57. The Hearing**

Generally, the hearing and presentations of the parties shall be completed within one day. The arbitrator, for good cause shown, may schedule an additional hearing to be held within five days.

**58. Time of Award**

Unless otherwise agreed to by the parties, the award shall be rendered not later than five business days from the date of the closing of the hearing.

**ADMINISTRATIVE FEE SCHEDULE**

A filing fee of \$200 will be paid at the time the case is initiated.

The balance of the administrative fee of the AAA is based upon the amount of each claim and counterclaim as disclosed when the claim and counterclaim are filed, and is due and payable prior to the notice of appointment of the neutral arbitrator.

In those claims and counterclaims which are not for a monetary amount, an appropriate administrative fee will be determined by the AAA, payable prior to such notice of appointment.

Amount of Claim or Counterclaim	Fee for Claim or Counterclaim
\$1 to \$20,000	3% (minimum \$200)
\$20,000 to \$40,000	\$ 600, plus 2% of excess over \$20,000
\$40,000 to \$80,000	\$1,000, plus 1% of excess over \$40,000
\$80,000 to \$160,000	\$1,400, plus ½% of excess over \$80,000
\$160,000 to \$5,000,000	\$1,800, plus ¼% of excess over \$160,000

Where the claim or counterclaim exceeds \$5 million, an appropriate fee will be determined by the AAA. If there are more than two parties represented in the arbitration, an additional 10% of the administrative fee will be due for each additional represented party.

When no amount can be stated at the time of filing, the administrative fee is \$500, subject to adjustment in accordance with the schedule as soon as an amount can be disclosed.

**OTHER SERVICE CHARGES**

\$50 payable by each party for each second and subsequent hearing which is either clerked by the AAA or held in a hearing room provided by the AAA.

**POSTPONEMENT FEES****Sole-Arbitrator Cases:**

\$50 payable by a party first causing an adjournment of any scheduled hearing.

\$100 payable by a party causing a second or subsequent adjournment of any scheduled hearing.

**Three-Arbitrator Cases:**

\$75 payable by a party first causing an adjournment of any scheduled hearing.

\$150 payable by a party causing a second or subsequent adjournment of any scheduled hearing.

**REFUND SCHEDULE**

If the AAA is notified that a case has been settled or withdrawn before a list of Arbitrators has been sent out, all the fee in excess of \$200 will be refunded.

If the AAA is notified that a case has been settled or withdrawn before the due date for the return of the first list, two-thirds of the fee in excess of \$200 will be refunded.

If the AAA is notified that a case is settled or withdrawn during or following a pre-hearing conference or at least 48 hours before the date and time set for the first hearing, one-third of the fee in excess of \$200 will be refunded.



END

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